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03-6696 (12)

No. 02-7338

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI, et al.,

Petitioners-Appellees,

v.

DONALD RUMSFELD, et al.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JOINT APPENDIX

FRANK W. DUNHAM, JR.
LARRY W. SHELTON
GEREMY C. KAMENS

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TABLE OF CONTENTS

	Page
District Court Docket Sheet	00000001
Petition for Writ of Habeas Corpus (6/11/02)	00000008
ORDER Consolidating Cases, Appointing Counsel, Ordering Access (6/11/02)	00000030
Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus (7/25/02)	00000034
Declaration of Michael H. Mobbs (7/24/02)	00000061
Petitioner's Traverse and Response to Respondents' Motion to Dismiss (7/30/02)	00000063
Petitioner's Rule 26 Disclosures (7/22/02)	00000129
Respondents' Rule 26 Statement (7/22/02)	00000132
ORDER Requiring USA to Either Submit Rule 26 Disclosures or Make a Motion for Relief from Rule 26 by July 24 (7/22/02)	00000136
Respondents' Rule 26 Disclosures (7/24/02)	00000139
ORDER Setting Hearing to be Held August 8, 2002, and Directing Government to Produce Documents (7/31/02)	00000141
Letter to Court with Attached Declaration of Colonel Donald D. Woolfolk (8/02/02)	00000143
ORDER Granting Motion to Dissolve Court's June 14 Stay Order (Court of Appeals) (8/08/02)	00000148

Petitioner's Notice of Supplemental Materials (8/12/02) 00000150

Transcript of Proceedings (8/13/02) 00000324

ORDER Holding Mobbs Declaration Insufficient and Requiring Production of Documents (8/16/02) 00000425

Transcript of Telephonic Conference (8/20/02) 00000440

ORDER Certifying Appeal and Staying Production of Documents (8/21/02) 00000464

U.S. District Court

Eastern District of Virginia (Norfolk)

CIVIL DOCKET FOR CASE #: 02-CV-439

Hamdi, et al v. Rumsfeld, et al

Filed: 06/11/02
Assigned to: Judge Robert G. Doumar
Referred to: Magistrate Judge James E. Bradberry
Demand: $0,000
Nature of Suit: 530
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 28:2241 Petition for Writ of Habeas Corpus (Federal)

YASER ESAM HAMDI petitioner	Larry W. Shelton [COR LD NTC] Office of the Federal Public Defender 150 Boush St Suite 403 Norfolk, VA 23510 (757) 457-0808 Frank W. Dunham, Jr. [COR LD NTC] Office of the Public Defender One Capital Square 830 East Main Street Suite 1100 Richmond, VA 23219 (804 343-0800 Yaser Esam Hamdi [NTC] [PRO SE] Norfolk Naval Brig 825 Ingersoll Street Norfolk, VA 23511-2695
ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi petitioner	Esam Fouad Hamdi [NTC] [PRO SE] P.O. Box 240 Jubail, Saudi Arabia, 31951

00000001

DONALD H. RUMSFELD respondent	Lawrence Richard Leonard [COR LD NTC] Office of United States Attorney 101 West Main Street Suite 8000 Norfolk, VA 23510 (757) 441-6331 Gregory George Garre [COR LD NTC] U.S. Department of Justice Office of the Solicitor General 950 Pennsylvania Ave., NW Washington, DC 20530 ***N/A*** (202) 514-2201
COMMANDER W.R. PAULETTE respondent	Lawrence Richard Leonard (See above) [COR LD NTC] Gregory George Garre (See above) [COR LD NTC]

FRIENDS OF IMMIGRATION LAW ENFORCEMENT movant	

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
6/11/02	1	PETITION for writ of habeas corpus FILING FEE $5.00; RECEIPT #34685 (vwar)
6/11/02	--	CASE REFERRED to Magistrate Judge James E. Bradberry (vwar)
6/11/02	2	ORDER that the petition be filed; further ordering that this case and case 2:02cv348 and 2:02cv382 be consolidated; ordering that this case be consolidated with those cases subject to the USCA for the 4th Circuit allowing such consolidation; ordering that the federal public defender's office and/or Frank Dunham and/or Larry Shelton be appointed counsel for the petitioner; ordering that the respondents answer this order to show cause by 12:00 noon on 6/17/02; ordering that the respondents allow either Frank Dunham or Larry Shelton the opportunity to meet with Yaser Esam Hamdi within 72 hours of the entry of this order or immediately following the elimination of the AT[illegible] in this order, an interpreter with the appropriate government security clearance will be allowed to attend the meeting; ordering that this order is stayed until 5:00 p.m. on Friday, 6/14/02 to allow the respondents an opportunity to appeal this order or if the USCA allows a consolidation with the other pending cases until further order of the Court of Appeals, entered and filed 6/11/02 signed by Judge Robert G. Doumar) Copies Mailed: 6/11/02 [EOD Date: 6/11/02] (vwar)
6/12/02	3	U.S. Marshals return of service. Returned Executed as to Donald H. Rumsfeld, Commander W.R. Paulette 6/12/02 Answer due on 6/12/02 for Commander W.R. Paulette, for: Donald H. Rumsfeld (jcow)
6/12/02	4	ORDER that the petition be served upon the respondents and the US Attorney, directing the clerk to forward copies of both the petition and this order by fax and US mail to all counsel of record in the consolidated action, to Gregory Garre of the US Department of Justice, to the US Court of Appeals for the Fourth Circuit and to Yaser Esam Hamdi; further directing the clerk to forward a copy of both the petition and this order to the US Marshal for service of both upon the respondents and the US Attorney; directing the US Marshal's office to serve both the petition and this order upon the respondents and the US Attorney, entered and filed 6/12/02 signed by Judge Robert G. Doumar Copies Mailed: 6/12/02 [EOD Date: 6/12/02] (jcow)
6/13/02	5	NOTICE OF APPEAL by Donald H. Rumsfeld, Commander W.R. Paulette (jcow)
6/13/02	--	Copy of Notice of Appeal, Order and docket sheet to USCA copy of notice of appeal to respondent/appellant re: [5-1] appeal by Commander W.R. Paulette, Donald H. Rumsfeld; copy of notice of appeal to counsel of record (jcow)
6/13/02	6	Copy of USCA Order Granting the emergency motion for temporary stay and staying the district court's order of 6/11/02, pending this Court's ruling on appellants' motion for a stay pending appeal of that order; directing appellees to file a response to the motion for stay pending appeal to be received by the clerk no later than 2:00pm on 6/14/02. (jcow)
6/17/02	7	Copy of USCA Order Granting a stay of the district court's June 11 order in this case, the Court further stays all proceedings before the district court in connection with this detainee until resolution of this appeal and appeal No. 02-6827; all stays shall remain in effect pending further order of this Court; directing the parties to file briefs on the merits of the appeal. (jcow)
6/18/02	8	U.S. Marshal Service Process form Returned Executed as to Donald H. Rumsfeld, Commander W.R. Paulette 6/13/02 (jcow)
6/19/02	--	USCA Case Number Re: [5-1] appeal by Commander W.R. Paulette, Donald H. Rumsfeld CASE MANAGER: Lisa Jernigan USCA NUMBER: 02-6895 (jcow)
6/20/02	9	Copy of USCA Order directing tht oral argument in appeal No. 02-6895 be scheduled for 6/25/02 at 2:30 (jcow) (Entry date 06/21/02)

6/21/02	11	Two U.S. Marshals Service process receipt and return form. Returned Executed as to Donald H. Rumsfeld 6/12/02 (jcow)
6/27/02	12	SUMMONS Returned Executed as to Donald H. Rumsfeld [illegible] (jcow)
7/15/02	13	Advanced copy of Opinion of USCA re: [5-1] appeal by Commander W.R. Paulette, Donald H. Rumsfeld - REVERSED AND REMANDED by published opinion (lbax) [Entry date 07/16/02] [Edit date 07/17/02]
7/18/02	14	TRANSCRIPT OF PROCEEDINGS for dates of 7/18/02, before USDJ Robert G. Doumar, OCR - Penny C. Wile (vwar
7/18/02	15	Court Proceedings: RGD. USDJ. Counsel appeared. Came on for scheduling conference. Govt. to answer petition on or before 12:00 p.m., 7/25/02; replies due on or before 12:00 p.m., 7/30/02. Govt. to file any motion to terminate appointment of counsel on or before 12:00 p.m., 7/23/02. replies due on or before 7/24/02. Rule 26 disclosures due on or before 12:00 p.m., 7/22/02. (bwin)
7/19/02	16	Advanced copy of Opinion of USCA re: [5-1] appeal by Commander W.R. Paulette, Donald H. Rumsfeld 7/12/02 (jcow)
7/22/02	17	Respondents' Rule 26 Statement filed by Donald H. Rumsfeld, Commander W.R. Paulette (jcow)
7/22/02	18	ORDER that the US Attorney either submit the disclosures required by Rule 26 or make a proper motion for relief by 7/24/02 at noon, entered and filed 7/22/02 (signed by Judge Robert G. Doumar) Copies Mailed: 7/22/02 [EOD Date: 7/23/02] (jcow) [Entry date 07/23/02]
7/23/02	19	Response by Yaser Esam Hamdi to respondents' refusal to file Rule 26 disclosures filed [16-1] by Commander W.R. Paulette, Donald H. Rumsfeld (jcow)
7/23/02	20	MOTION by Commander W.R. Paulette, Donald H. Rumsfeld to terminate appointment of counsel or in the alternative to require counsel to show cause why the financial eligibility requirements of 18 U.S.C. 3006A are met (jcow)
7/23/02	21	MEMORANDUM in support of [19-1] motion to terminate appointment of counsel or in the alternative to require counsel to show cause why the financial eligibility requirements of 18 U.S.C. 3006A are met by Commander W.R. Paulette, Donald H. Rumsfeld, received (jcow)
7/24/02	22	RESPONSE by Yaser Esam Hamdi, Esam Fouad Hamdi to [19-1] motion to terminate appointment of counsel by Commander W.R. Paulette, Donald H. Rumsfeld (jcow)
7/24/02	23	MOTION by Commander W.R. Paulette, Donald H. Rumsfeld for relief from this court's order dated July 18, 2002 requiring the government to file Federal Rule of Civil Procedure 26(a)(1) initial disclosures (jcow)
7/24/02	24	MEMORANDUM in support of [23-1] motion by Commander W.R. Paulette, Donald H. Rumsfeld for relief from this court's order dated July 18, 2002 requiring the government to file Federal Rule of Civil Procedure 26(a)(1) initial disclosures, received (jcow)
7/24/02	24	TRANSCRIPT of telephonic conference for date of 7/24/02

		before U.S. District Judge Robert G. Doumar. Penny [illegible] OCR. (jcow) [Entry date 07/25/02]
7/25/02	25	ANSWER to Complaint by Donald H. Rumsfeld, Commander W.R. Paulette (jcow)
7/25/02	26	MOTION with Memorandum in Support by Commander W.R. Paulette, Donald H. Rumsfeld to Dismiss (jcow)
7/25/02	27	MOTION by Commander W.R. Paulette, Donald H. Rumsfeld for Gregory George Garre to appear pro hac vice (jcow)
7/26/02	28	RESPONSE by Yaser Esam Hamdi, Esam Fouad Hamdi to [21-1] motion for relief from this court's July 18, 2002 order by Commander W.R. Paulette, Donald H. Rumsfeld (jcow)
7/26/02	29	REPLY by Donald H. Rumsfeld, Commander W.R. Paulette to response to [19-1] motion by Commander W.R. Paulette, Donald H. Rumsfeld by Commander W.R. Paulette, Donald H. Rumsfeld (jcow)
7/29/02	--	So Ordered: granting [26-1] motion by Commander W.R. Paulette, Donald H. Rumsfeld for Gregory George Garre to appear pro hac vice, fee waiver granted, entered and filed 7/29/02 (signed by Judge Robert G. Doumar) Copies Mailed: 7/29/02 (jcow)
7/30/02	29	RESPONSE by Yaser Esam Hamdi, Esam Fouad Hamdi to [25-1] motion to Dismiss by Commander W.R. Paulette, Donald H. Rumsfeld (jcow)
7/31/02	30	ORDER setting a hearing to hear argument on materials submitted, set Hearing Deadline for 2:00 8/8/02, further ordering the government to produce certain materials (see order for specifics) by noon on 8/6/02, entered and filed 7/31/02 (signed by Judge Robert G. Doumar) Copies Mailed: and faxed 7/31/02 [EOD Date: 7/31/02] (jcow)
8/1/02	31	Notice of supplemental authority filed by petitioner Yaser Esam Hamdi, petitioner Esam Fouad Hamdi (jcow)
8/5/02	32	MOTION by Commander W.R. Paulette, Donald H. Rumsfeld for relief from this court's production order of July 31, 2002 (jcow) [Entry date 08/06/02]
8/5/02	33	MEMORANDUM in support of [32-1] motion for relief from this court's production order of July 31, 2002 by Commander W.R. Paulette, Donald Rumsfeld, received (jcow) [Entry date 08/06/02]
8/7/02	34	ORDER that the hearing scheduled for 8/8/02 at 2:00pm is cancelled and suspending all proceedings in this case until the Court of Appeals has acted on the motion of the petitioner for relief from the stay, entered and filed 8/7/02 signed by Judge Robert G. Doumar) Copies Mailed: and faxed 8/7/02 [EOD Date: 8/7/02] (jcow)
8/8/02	35	Copy of USCA Order Dissolving the stay in order that the district court may proceed in strict compliance with our July 12, 2002 decision which directed the court to consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary; in accordance with the principles set forth in Hamdi v. Rumsfeld 2002 WL 1483908 (4th Cir. July 12, 2002

		the district court shall consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further entered at the direction of Chief Judge Wilkinson with the concurrence of Judge Wilkins and Judge Traxler (jcow
8/9/02	36	Opinion of USCA re: [5-1] appeal by Commander W.R. Paulette, Donald H. Rumsfeld 7/12/02 (jcow
8/9/02	37	JUDGMENT OF USCA Reversing the District Court's June 11 order mandating access to counsel, REMANDING to the District Court for further proceedings consistent with the Court's opinion (certified copy) Re: [5-1] appeal filed (jcow)
8/9/02	38	ORDER setting this matter for a hearing on 8/13/02 at 11:00 a.m., for argument on the sufficiency of the Mobbs declaration, entered and filed 8/9/02 (signed by Judge Robert G. Doumar) Copies Mailed: 8/9/02 [EOD Date: 8/9/02] (vwar)
8/9/02	--	Hearing Deadline set at 11:00, on 8/13/02 before Judge Robert G. Doumar (vwar)
8/12/02	39	ORDER directing counsel to file an additional copy of pleadings, which are not in camera or under seal which copy the Clerk shall provide to the Court's contract copy service for access to the media and the public at the usual fee, the copy service telephone number is 757-533-9126, entered and filed 8/12/02 (signed by Judge Robert G.) Copies Mailed: 8/12/02 [EOD Date: 8/12/02] (vwar) [Edit date 08/12/02]
8/12/02	40	NOTICE of Supplemental Materials by Donald H. Rumsfeld, Commander W.R. Paulette (vwar)
8/13/02	41	Court Proceedings: RGD, USDJ, Penny Wile, OCR, Counsel appeared. Came on for hearing on the sufficiency of the Mobbs declaration. Arguments heard. Court takes matter under advisement. (bwin)
8/14/02	42	TRANSCRIPT OF PROCEEDINGS for dates of 8/13/02, before USDJ Doumar, Penny C. Wile, OCR (vwar)
8/16/02	43	ORDER denying [32-1] motion by Commander W.R. Paulette, Donald H. Rumsfeld for relief from this court's production order of July 31, 2002; directing the respondents to submit to the court the materials previously requested in the 7/31/02 order, together with the screening criteria utilized to determine the status of Hamdi with the names and addresses of the persons who made the determination; such sealed documents to be produced by 4:30 p. on 8/21/02 for the Judge's in camera review, entered and filed 8/16/02, (signed by Judge Robert G. Doumar, Copies Mailed: 8/16/02 [EOD Date: 8/16/02] (arlv
8/19/02	44	MOTION by Commander W.R. Paulette, Donald H. Rumsfeld for certification of interlocutory appeal and for stay (jcow) [Entry date 08/20/02]
8/20/02	45	Chambers Proceedings (Conference Call): RGD, USDJ, Penny Wile, OCR. Participants: Larry W. Shelton, Lawrence R. Leonard and Gergory G. Garre. Respondents' motion to extend time to submit materials to the court granted. Materials to be submitted to Judge Doumar's Chambers, under seal, by 12:00 p.m., 8/26/02. Petitioner to reply to respondents'

		motion for interlocutory appeal by 12:00 8/26 (bwin
8/20/02	46	ORDER that the petitioners file their brief, set Brief deadline to 10:00 8/21/02, Ordering the respondents to produce the documents outlined in the 8/16/02 production order, set Respond Deadline 12:00 8/26/02, or at such time as the court directs after the court decides the respondents' motion for certification of interlocutory appeal, entered and filed 8/20/02 signed by Judge Robert G. Doumar (Copies Mailed and faxed: 8/20/02 [EOD Date: 8/20/02] (jcow
8/21/02	47	Response by Yaser Esam Hamdi, Esam Fouad Hamdi to [44-1] motion by Commander W.R. Paulette, Donald H. Rumsfeld for Certification of Interlocutory Appeal and for Stay, received (vwar
8/21/02	48	TRANSCRIPT of TELEPHONIC CONFERENCE for dates of 8/20/02 before USDJ Robert G. Doumar, Penny C. Wile, OCR (vwar
8/21/02	49	ORDER certifying the question regarding the Mobbs Declaration, as outlined in the order, to the Fourth Circuit Court of Appeals and staying the deadline for compliance with its 8/16/02 production order until 5 days after the Court of Appeals for the Fourth Circuit either declines jurisdiction over the appeal or issues a ruling on the certified question, entered and filed 8/21/02 , signed by Judge Robert G. Doumar (Copies Mailed: 8/21/02 [EOD Date: 8/21/02] (vwar
8/22/02	50	MOTION by Friends of Immigration to Intervene (vwar)
8/23/02	51	RESPONSE by Yaser Esam Hamdi, Esam Fouad Hamdi to [50-1] motion by Friends of Immigration to Intervene (arlv) [Entry date 08/26/02]
8/26/02	52	REPLY by Friends of Immigra. to response to [50-1, motion to Intervene, received, (vwar)
9/12/02	53	Copy of USCA Order granting respondents' petition for permission to appeal the district court's 8/16/02 order; respondents' opening brief is due 10/4/02, petitioners' answering brief is due by 10/18/02, respondents' reply brief is due 10/24/02 and oral argument is scheduled for 10/28/02 at 2:30 (jcow
9/18/02	54	RESPONSE in Opposition by Donald H. Rumsfeld, Commander W.R. Paulette to [50-1, motion by Friends of Immigration Law Enforcement to Intervene (jcow) [Entry date 09/19/02]

Case Flags:
APPEAL

END OF DOCKET: 2:02cv439

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FILED
JUN 11 2002
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

YASER ESAM HAMDI,

ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD
Secretary of Defense
The Pentagon
Arlington, Va.,

COMMANDER W.R. PAULETTE,
Norfolk Naval Brig
8251 Ingersoll St.
Norfolk, Va. 23511-2699,

Respondents.

CASE NO. 2:02cv439

PETITION FOR WRIT OF HABEAS CORPUS

1. Petitioner Yaser Esam Hamdi, a citizen of the United States of America, is being held illegally, denied access to legal counsel, and denied access to the Court in violation of his constitutionally protected rights. Esam Fouad Hamdi, on behalf of his son, Yaser Esam Hamdi as his Next Friend, requests that this Court issue a Writ of Habeas Corpus.

PARTIES

2. Petitioner Yaser Esam Hamdi is an American citizen presently incarcerated and unlawfully

held by Respondents at the Norfolk Naval Station in Norfolk, Virginia. Mr. Hamdi was born in Baton Rouge, Louisiana, on September 26, 1980. *See* Exhibit A.

3. Petitioner Esam Fouad Hamdi is the father of Yaser Esam Hamdi. Esam Fouad Hamdi has had no contact with his son since Respondents gained custody of Yaser Esam Hamdi in 2001.

4. Respondent Paulette is a Commander in charge of the Norfolk Naval Brig. He is the custodian immediately responsible for the detention of Mr. Hamdi.

5. Respondent Rumsfeld is the United States Secretary of Defense and Respondent Paulette's superior.

JURISDICTION

6. Petitioners bring this action under 28 U.S.C. §§ 2241 and 2242, and invoke this Court's jurisdiction under 28 U.S.C. §§ 1331, 1350, 1651, 2201, and 2202; as well as under the Fifth and Fourteenth Amendments to the United States Constitution.

7. This Court is empowered under 28 U.S.C. § 2241 to grant the Writ of Habeas Corpus, and to entertain the Petition filed by Esam Fouad Hamdi, as Next Friend under 28 U.S.C. § 2242.

VENUE

8. Venue is proper in the United States District Court for the Eastern District of Virginia because the Petitioner's custodian resides in this district and the Petitioner is being held unlawfully in this district. 28 U.S.C. §§1391(b); 1391(e).

STATEMENT OF FACTS

9. Yaser Esam Hamdi is a citizen of the United States of America. When seized by the United States Government, Mr. Hamdi resided in Afghanistan.

Petitioner's Seizure By The United States

10. In the wake of September 11, 2001, the United States initiated military action against the Taliban Government in Afghanistan. On September 18, 2001, a Joint Resolution of Congress authorized the President to use force against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons." Joint Resolution 23, Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224 (Sept. 18, 2001) ("the Resolution") (attached as Exhibit B). The Resolution does not authorize the indefinite detention of persons seized on the field of battle.

11. In the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely-knit coalition of military groups opposed to the Taliban Government.

12. In the course of its assistance to the Northern Alliance, the United States obtained access to individuals held by various factions of the Northern Alliance. On information and belief, Mr. Hamdi was captured or transferred into the custody of the United States in the Fall of 2001. Mr. Hamdi has been held in United States custody since that time without access to legal counsel or notice of any charges pending against him.

The Detention Order

13. On November 13, 2001, President George W. Bush issued a Military Order authorizing indefinite detention without due process of law. The Order authorizes Respondent Rumsfeld to detain "any individual who is *not a United States citizen*" that President George W. Bush has "reason to believe:"

> i. is or was a member of the organization known as al Qaida;
>
> ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> iii. has knowingly harbored one or more individuals described in subparagraphs (i) and (ii).

See Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001) (attached as Exhibit C). President George W. Bush must make this determination in writing.

14. On information and belief, President George W. Bush has never certified or determined in any manner, in writing or otherwise, that Yaser Esam Hamdi is subject to this detention order.

15. By its own terms, the Military Order does not authorize the detention of United States citizens. Accordingly, Yaser Esam Hamdi is not properly subject to this detention order.

Guantanamo Bay Naval Station

16. On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba. Approximately 7,000 military and civilian people reside in Guantanamo Bay under the complete jurisdiction and control of the United States.

17. On or about January 11, 2002, the precise date unknown to Petitioners but known to Respondents, the United States military transferred Yaser Esam Hamdi to Camp X-Ray, Guantanamo Bay, where he was held until April 2002.

18. While held in Guantanamo Bay, the United States military denied Yaser Esam Hamdi access to legal representation or notice of the charges against him.

Norfolk Naval Brig

19. On or about April 6, 2002, Mr. Hamdi was transferred to a military jail at the Norfolk Naval Station in Norfolk, Virginia.

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20. To date, Yaser Esam Hamdi has not been charged with an offense, nor has he been notified of any pending or contemplated charges. Mr. Hamdi has made no appearance before either a military or civilian tribunal of any sort, nor has he been provided counsel or the means to contact counsel. On information and belief, Mr. Hamdi has not been informed of his rights under the United States Constitution. As a result, Mr. Hamdi is entirely unable to assert his constitutional rights to counsel or protection from unlawful detention.

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CLAIMS AS TO THE UNLAWFULNESS OF PETITIONER'S DETENTION

FIRST CLAIM FOR RELIEF
(DUE PROCESS - FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION)

21 Petitioners incorporate paragraphs 1-20 by reference.

22. As an American citizen, Yaser Esam Hamdi enjoys the full protections of the Constitution. *See Reid v. Covert*, 354 U.S. 1, 32-33 (1957) ("[The view that] constitutional safeguards do not shield a citizen abroad when the Government exercises its power over him . . . is erroneous. The mere fact that [the defendants] had gone overseas . . . should not reduce the protection the Constitution gives them."); *see also Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 244-48 (1960) (refusing to permit military prosecution of citizen who was not a member of the United States armed forces).

23 By the actions described above, Respondents, acting under color of law, have violated and continue to violate the Fifth and Fourteenth Amendments to the United States Constitution. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that the [Due Process] Clause protects. . . . And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate constitutional protections . . . .").

SECOND CLAIM FOR RELIEF
(SUSPENSION OF THE WRIT)

24. Petitioners incorporate paragraphs 1-23 by reference.

25. To the extent the order of November 13, 2001, disallows any challenge to the legality of the Mr. Hamdi's detention by way of habeas corpus, the Order and its enforcement constitute an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution.

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PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for relief as follows:

1. Grant Petitioner Esam Fouad Hamdi Next Friend status, as Next Friend of Yaser Esam Hamdi;
2. Appoint counsel to represent Yaser Esam Hamdi because he is indigent and has no funds with which to retain counsel in the United States;[1]
3. Order Respondents to cease all interrogations of Yaser Esam Hamdi, direct or indirect, while this litigation is pending;
4. Order and declare that Yaser Esam Hamdi is being held in violation of the Fifth and Fourteenth Amendments to the United States Constitution;
5. To the extent Respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations;
6. Order that Petitioner Yaser Esam Hamdi be released from Respondents' unlawful custody;
7. Such other relief as the Court may deem necessary and appropriate to protect Petitioner Yaser Esam Hamdi's rights under the United States Constitution.

[1] See Exhibit D.

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Dated: June 8th 2002

Respectfully submitted,

Yaser Esam Hamdi, and Esam Fouad Hamdi,
as Next Friend of Yaser Esam Hamdi

Esam Fouad Hamdi
P.O. Box 240
Jubail, Saudi Arabia 31951

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VERIFICATION

KINGDOM OF SAUDI ARABIA
DISTRICT OF THE CONSULATE
SECTION OF THE CONSULATE
GENERAL OF THE UNITED STATES
OF AMERICA AT DHAHRAN } ss:
JUBAIL, SAUDI ARABIA

I, Esam Fouad Hamdi, next friend for Petitioner Yaser Esam Hamdi, being first duly sworn, state under pain and penalty of perjury that to the best of my knowledge and belief, the facts set forth in this Petition are true and correct.

Esam Fouad Hamdi

Subscribed and sworn to before me this 8th day of June, 2002
Appeared before me Esam Fouad Hamdi, only

Jason E. Bruder
Vice Consul
American Consulate General
Dhahran, Saudi Arabia

EXHIBIT A

EXHIBIT B

CERTIFICATE OF LIVE BIRTH

I 2048855

BIRTH NO. 117-1980-058-00393

1A CHILD'S LAST NAME: HAMDI
1B FIRST NAME: YASER
1C SECOND NAME: ESAH
2A BIRTH DATE: SEPTEMBER 26, 1980
2B TIME OF BIRTH: 4:05 PM
3 SEX: MALE
4A PLACE OF BIRTH (CITY, TOWN, OR LOCATION): BATON ROUGE
4B PARISH OF BIRTH: EAST BATON ROUGE
4C NAME OF HOSPITAL OR INSTITUTION: WOMAN'S HOSPITAL
5 NUMBER BORN: SINGLE
5A BIRTH ORDER:
7A RESIDENCE OF MOTHER (CITY, TOWN, OR LOCATION): BATON ROUGE
7B PARISH: EAST BATON ROUGE
7C STATE: LOUISIANA
7D ZIP CODE: 70809
7E STREET ADDRESS OF RESIDENCE: 10448 JEFFERSON HIGHWAY APT E
8A FATHER'S LAST NAME: HAMDI
8B FIRST NAME: ESAM
8C SECOND NAME: FOUAD
8D CITY AND STATE OF BIRTH (IF NOT U.S., NAME OF COUNTRY): MECCA, SAUDI ARABIA
8E AGE AT THIS BIRTH: 25
9A MOTHER'S MAIDEN NAME: FATTANI
9B FIRST NAME: NADIAH
9C SECOND NAME: HUSSEIN
9D FATHER AND MOTHER BIRTHPLACE (IF NOT U.S., NAME OF COUNTRY): SAUDI ARABIA
9E AGE AT THIS BIRTH: 21

DATE SIGNED: OCTOBER 22, 1980
DATE RECD: MAY 23, 2002

THE ABOVE IS A TRUE CERTIFICATE OF NAME AND BIRTH FACTS ON FILE IN THE VITAL RECORDS REGISTRY OF THE STATE OF LOUISIANA PURSUANT TO R.S.

A REPRODUCTION OF THIS DOCUMENT IS VOID AND INVALID UNLESS IT ACCEPTED

UNITED STATES PUBLIC LAWS
107th Congress -- 1st Session
(c) 2001, LEXIS-NEXIS, A DIVISION OF REED ELSEVIER INC. AND REED ELSEVIER PROPERTIES INC.

PUBLIC LAW 107-40 [S.J. Res. 23]

SEPT. 18, 2001

107 P.L. 40; 115 Stat. 224; 2001 Enacted S.J. Res. 23; 107 Enacted S.J. Res. 23

BILL TRACKING REPORT: 107 Bill Tracking S.J. Res. 23
FULL TEXT VERSION(S) OF BILL: 107 S.J. Res. 23

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

[*1] SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

[*2] SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) In General.--That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements.--

(1) Specific statutory authorization.-- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended

to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) Applicability of other requirements.-- Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Speaker of the House of Representatives.
Vice President of the United States and President of the Senate.

EXHIBIT C

LEXSEE 66 fed. reg. 57833

FEDERAL REGISTER

Vol. 66, No. 222

Presidential Documents

PRESIDENT OF THE UNITED STATES

Military Order of November 13, 2001

Title 3 -

The President

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

Part IV

66 FR 57833

ATE: Friday, November 16, 2001

To view the next page, type .np* TRANSMIT.
To view a specific page, transmit p* and the page number, e.g. p*1

[*57833]

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. Findings.

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented

will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense [*57834] purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy.

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be -

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for- [*57835]

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense.

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

(a) Nothing in this order shall be construed to-

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order-

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or [*57836] proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication.

This order shall be published in the Federal Register.

/s/ George W. Bush

THE WHITE HOUSE,

November 13, 2001.

[FR Doc. 01-28904 Filed 11-15-01; 8:56 am]

Billing code 3195-01-P

EXHIBIT D

AFFIDAVIT

Saturday, May 11, 2002

I, Esam Faoud Amin Hamdi, Saudi National and holder of passport number C025243, of P.O. Box 240, Jubail 31951, Saudi Arabia make oath and say as follows: My son Yaser Esam Hamdi, who is in a prison in the United States of America, has no assets whatsoever, with which he will be able to retain the services of a lawyer and also that I personally will be unable to provide funds for the legal services which my son will require.

Signature: (Esam Faoud Amin Hamdi)

ALI A. ALYAMI PASSPORT NO. C 248704
Witness

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FILED
JUN 11 2002
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. CIVIL ACTION NO. 2:02cv439

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

ORDER

Currently before the Court is the matter of a third petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, filed on behalf of the Petitioner, Yaser Esam Hamdi, who is currently being held incommunicado in the brig of the naval base in Norfolk, Virginia.

The instant petition has been filed by Hamdi's father, Esam Fouad Hamdi, as next friend. The Supreme Court in Whitmore v. Arkansas, 495 U.S. 149 (1990), established a two prong test for whether someone is a proper next friend for purposes of filing a habeas corpus petition on behalf of a person in custody. "First, a 'next friend' must provide an adequate explanation--such as inaccessibility, mental incompetence, or other disability--why the real party in interest cannot appear on his own behalf to prosecute the action." Id. at 163. The reason why the real party in interest cannot appear on his own behalf in this case is obvious - Yaser Esam Hamdi is being held incommunicado on a military installation within the Eastern District of Virginia. The second prong

Jun-11-2002 17:19 CLERK US DIST COURT

requires that "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate the action" and that dedication is generally shown by the next friend having "some significant relationship with the real party in interest." Id. The Petitioner's father, who has attempted for some months to arrange for his son to meet with an attorney, clearly qualifies under this standard. Therefore, having found that the Petitioner's father, Esam Fouad Hamdi, is a proper next friend of the Petitioner, the Court hereby **ORDERS** the petition filed.

The instant petition is the third filed on behalf of Hamdi. The prior two cases (2:02cv348 and 2:02cv382) have been consolidated because they arise out of the exact same circumstance, Hamdi's confinement, and involve the same parties, Hamdi and the United States government. For the same reason, the Court hereby **ORDERS** that those cases be consolidated with the instant case. It further appearing to the Court that the matters involved in this case are currently on appeal before the United States Court of Appeals for the Fourth Circuit, the Court **ORDERS** that this case be consolidated with those cases subject to the United States Court of Appeals for the Fourth Circuit allowing such consolidation.

Furthermore, it is appropriate to appoint counsel in this case, specifically the Federal Public Defender's Office. The petition includes an affidavit by Esam Fouad Hamdi that his son is without funds to retain his own counsel, and that the father is also unable to pay for an attorney for his son. The Court hereby finds that this affidavit is sufficient evidence of financial eligibility to warrant the appointment of counsel under 28 U.S.C. § 3006A. As to the identity of counsel, Frank Dunham and/or Larry Shelton of the Federal Public Defenders Office have both been appointed counsel for Hamdi in the already pending consolidated case, and given their familiarity with this case and their eagerness to proceed as Hamdi's attorneys, this Court sees no reason to appoint another counsel.

Therefore, this Court **ORDERS** that the Federal Public Defenders Office, and/or Frank Dunham and/or Larry Shelton be appointed counsel for the Petitioner.

In its Order of May 29, 2002, this Court Ordered the Respondents to Show Cause why a writ of habeas corpus should not be granted in this case, and set a date for the Respondents' answer and for a hearing on the matter. Because this case is now consolidated with the previous case in which that Order was issued, and since that Order was stayed, it would be appropriate to set a time when an answer should be filed. Accordingly, it is **ORDERED** that the Respondents answer this Order to Show Cause by 12:00 noon on June 17, 2002. As previously scheduled, the hearing to discuss these matters will be before this Court on June 20, 2002, at 2:00 p.m.

Furthermore, for the same reasons articulated in the May 29, 2002 Order, this Court hereby **ORDERS** that the Respondents allow either Frank Dunham or Larry Shelton from the Federal Public Defender's Office, as long as they possess the appropriate governmental security clearance, the opportunity to meet with Yaser Esam Hamdi within seventy-two hours of the entry of this Order or immediately following the elimination of any stay of this Order. Because it is represented to the Court that an interpreter will be needed for the attorney to communicate with Hamdi, an interpreter with the appropriate governmental security clearance will be allowed to attend the meeting. Finally, this meeting is to be private between Hamdi, the attorney, and the interpreter, without military personnel present, and without any listening or recording devices of any kind being employed in any way.

Finally, the Court **ORDERS** that this Order is stayed until 5:00 p.m. on Friday, June 14, 2002 to allow the Respondents an opportunity to appeal this Order, or if the United States Court of

Appeals for the Fourth Circuit allows the consolidation of this matter with the other pending cases until further Order of the Court of Appeals.

The Clerk of the Court is **DIRECTED** to forward copies of this Order, both by fax and by U.S. mail, to all counsel of record in the consolidated action, to Gregory Garre of the U.S Department of Justice, to the United States Court of Appeals for the Fourth Circuit, and to Yaser Esam Hamdi.

The Clerk is further **DIRECTED** to forward a copy of this Order to the United States Marshal for service of this Order upon the Respondents. The United States Marshal's office is hereby **DIRECTED** to serve this Order upon the Respondents.

IT IS SO ORDERED.

/s/ Rebecca Beach Smith

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

June 11, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI,

ESAM FOUAD HAMDI, As Next
Friend of Yaser Esam Hamdi,

Petitioners,

v. Civil Action No. 2:02cv439

DONALD RUMSFELD,
Secretary of Defense,

COMMANDER W.R. PAULETTE,
Norfolk Naval Brig,

Respondents.

RESPONDENTS' RESPONSE TO, AND MOTION TO DISMISS, THE PETITION FOR A WRIT OF HABEAS CORPUS

Respondents Donald Rumsfeld, Secretary of Defense, and Commander W.R. Paulette, Norfolk Naval Brig, by and through undersigned counsel, oppose and hereby move to dismiss the petition for a writ of habeas corpus in this case.

STATEMENT OF THE CASE

Background. On September 11, 2001, the al Qaida terrorist organization launched a large-scale, coordinated attack on the United States, killing approximately 3,000 persons, and specifically targeting the Headquarters of the Nation's Department of Defense. The President, pursuant to his constitutional authority as Commander in Chief, took immediate steps to prevent future attacks. Congress then authorized the President to use force against the "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military

Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (attached as Exh. B to Petition for a Writ of Habeas Corpus (Pet.)). Congress further emphasized that the forces responsible for the September 11 attack pose an "unusual and extraordinary threat to the national security and foreign policy of the United States," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Ibid.

The President, acting pursuant to his Commander in Chief authority and with express congressional support, dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaida terrorist network and the Taliban regime that had supported and protected that network. The ongoing military operations in Afghanistan – which are being conducted not only by thousands of men and women of the United States armed forces, but also by coalition forces of our international allies and members of the Northern Alliance and other local forces – have resulted, inter alia, in the destruction of al Qaida training camps, removal of the Taliban regime that supported al Qaida, and gathering of vital intelligence concerning the plans, operations, and workings of al Qaida and its supporters. Numerous members of the military forces sent to Afghanistan have lost their lives, and many others have suffered casualties as part of the campaign launched in the wake of September 11. See generally www.army.mil/enduringfreedom.

In the course of the military campaign – which remains active and ongoing – United States armed forces have captured or taken control of numerous individuals. Consistent with the settled laws and customs of war, and with the practice followed in virtually every other major armed conflict in the nation's history, the United States military has determined that many of the individuals captured in Afghanistan should be detained as enemy combatants. See Declaration of Michael H. Mobbs (Mobbs Decl.) (attached hereto). Such detention serves the vital objective of

preventing combatants from continuing to aid our enemies. In addition, detention of such combatants is critical to gathering intelligence in connection with the overall war effort, and especially with aiding military operations and preventing additional attacks on the United States or its allies.

The detainee in this case, Yaser Esam Hamdi, appears to be a Saudi national who, records indicate, was born in Louisiana. He was seized as an enemy combatant and taken into control of the United States military in Afghanistan, after the Taliban unit that he was with surrendered to Northern Alliance forces in late 2001. See Mobbs Decl. ¶¶ 3-4. Applying screening criteria established by the United States military to determine which detainees seized in Afghanistan should continue to be detained, United States military authorities determined that Hamdi should be detained as an enemy combatant. Id. ¶ 6; see id. at ¶ 2, 7.[1] In Afghanistan, Hamdi told United States military authorities that he went to Afghanistan to train with and, if necessary, fight for the Taliban. Id. ¶ 5. Subsequent interviews with Hamdi also confirm his status as an enemy combatant. Indeed, Hamdi himself has stated that he laid down his assault rifle upon surrendering to Northern Alliance forces. Id. ¶ 9. Hamdi was transported by the United States military from Afghanistan to the Naval Base at Guantanamo Bay, Cuba, and was later transferred to the Naval Brig in Norfolk, Virginia. Id. ¶ 8.

2. This Habeas Action. On June 11, 2002, the detainee's father, Esam Fouad Hamdi, filed

[1] The screening criteria themselves are classified. Respondents can provide the Court further information about the criteria in a classified filing that would be submitted ex parte and under seal. However, review of the screening criteria is not necessary to the resolution of the petition in this case, which, the for reasons explained below, fails as a matter of law.

this habeas action "on behalf of his son * * * as his Next Friend." Pet. ¶ 1.[2] The petition alleges, inter alia, that the detainee, Hamdi, was residing in Afghanistan when he was taken into control of the United States military, and that Hamdi has been detained by the military since the fall of 2001 without being "charged with an offense" or "provided counsel." Id. ¶¶ 9, 19; see id. ¶ 12. The petition presents two challenges to the "[]awfulness of [Hamdi]'s detention." Id. at 6 (heading). First, the petition states that, "[a]s an American citizen, [Hamdi] enjoys the full protections of the Constitution," and that Hamdi's detention "violate[s] the Fifth and Fourteenth Amendments to the United States Constitution." Id. ¶¶ 22, 23. Second, the petition states that, "[t]o the extent that [the President's Order of November 13, 2001] disallows any challenge to the legality of [Hamdi's] detention by way of habeas corpus, the Order and its enforcement constitute an unlawful suspension of the Writ, in violation of Article I of the United States Constitution." Id. ¶ 25. The petition seeks Hamdi's release from custody and certain other relief. See id. at 7.

Before respondents had been served with the petition or had any notice of it, this Court ordered the petition filed, and ordered the appointment of the federal public defender as "counsel for the Petitioner." June 11, 2002 Order at 2-3. The Court furthered ordered respondents to allow the public defender to meet with the detainee in "private * * * without military personnel present." Id. at 3. Respondents appealed the June 11 Order and requested a stay pending appeal. On June 14, 2002, the court of appeals stayed the June 11 Order and "all proceedings before the district court in connection with this detainee until resolution of th[e] appeal." Order, Hamdi v. Rumsfeld, No.

[2] Two previous habeas petitions were filed on behalf of Hamdi. Following an appeal of the May 29, 2002 Order entered by this Court in those cases, see Hamdi v. Rumsfeld, 2002 WL 1369635 (4th Cir. June 26, 2002), those petitions were ordered dismissed by this Court.

02-6895 The court of appeals specified that "[a]ll stays shall remain in effect pending further order of the Court." Ibid. On July 12, 2002, the court of appeals issued an opinion reversing and remanding this Court's June 11 Order, "[b]ecause the district court appointed counsel and ordered access to the detainee without adequately considering the implications of its actions and allowing the United States even to respond." Hamdi v. Rumsfeld, 2002 WL 1483908, at 1.

On July 18, 2002, before issuance of the court of appeals' mandate in that appeal and before any order of the Fourth Circuit lifting the stay of "all proceedings" before this Court involving Hamdi, the Court ordered respondents, inter alia, to respond to the petition by noon on July 25, 2002. In addition, the Court ordered respondents to supply with their response answers to three issues not raised by the petition itself: (1) whether the detainee is being held "incommunicado" and, if he is not, "why * * * he can have visitors but not one of them be a lawyer," Tr. of July 18, 2002 Hrg. at 5; (2) whether the detainee is being held in "solitary confinement" and, if so, "would due process apply to him" on the basis of being so held, id. at 6; and (3) "with whom is [the United States] fighting," and "how would [the war] ever end if there is no government or organization with one can deal." ibid. This motion to dismiss is filed in response to the Court's July 18 Order.[3]

[3] Because the court of appeals' mandate has not yet issued, the court of appeals' stay of "all proceedings before the district court in connection with this detainee" remains in effect. See 4th Cir. Rule 8 ("An order granting a stay or injunction pending appeal remains in effect until issuance of the mandate or further order of the Court."). Accordingly, respondents continue to object to the effort of this Court to exercise jurisdiction over this action before issuance of the mandate. See United States v. Montgomery, 262 F.3d 233, 239 (4th Cir.), cert. denied, 122 S. Ct. 526 (2001); see also Kusay v. United States, 62 F.3d 192 (7th Cir. 1995).

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ARGUMENT

THE PETITION SHOULD BE DISMISSED BECAUSE THE DETAINEE IS LAWFULLY DETAINED AS AN ENEMY COMBATANT

As the Fourth Circuit emphasized just weeks ago in this very case, this habeas action "arises in the context of foreign relations and national security, where a court's deference to the political branches of our national government is considerable." Hamdi v. Rumsfeld, 2002 WL 1483908, at *3; accord Thomasson v. Perry, 80 F.3d 915, 924-926 (4th Cir.), cert. denied, 519 U.S. 948 (1996); Tiffany v. United States, 931 F.2d 271, 277 (4th Cir. 1991). The petition challenges the authority of the Commander in Chief and the military to detain an enemy combatant captured in the theater of battle in a foreign land in connection with an ongoing military campaign. As the court of appeals held, the capture and detention of enemy combatants falls within the President's core war powers and, with respect to the present conflict, comes with the statutory authorization of Congress. See Hamdi, 2002 WL 1483908, at *3; id. at 5. Moreover, the court observed that "[t]he executive is best prepared to exercise the military judgment attending the capture of alleged combatants," and directed that "[a]ny judicial inquiry into [an individual]'s status as an alleged enemy combatant * * * must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack." Id. at *5. Applying those "cardinal principles" (id. at *3) here compels the conclusion that the petition's challenge to the "[l]awfulness of [Hamdi's] detention" (Pet. at 6 (heading)) fails as a matter of law and, therefore, the petition should be dismissed by this Court without any further inquiry.

A. It Is Settled That The Military's Detention Of Enemy Combatants In Connection With Ongoing Hostilities, Including The Current Conflict, Is "Lawful"

The first claim raised by the petition in this case is that Hamdi is being detained in violation

00000039

of the Constitution's due process guarantee. Pet. ¶¶ 21-23. That claim fails as a matter of law. The United States's authority to hold enemy combatants, including those with a claim to United States citizenship, is well-established and, indeed, in the wake of the recent appeal, is established law of the case in this action. Nothing in the Due Process Clause precludes such a detention. As the court of appeals has just held, "[i]t has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." Hamdi, 2002 WL 1483908, at *5 (emphasis added).

1. In so holding, the court of appeals drew upon a settled body of law recognizing that the United States military may seize and detain enemy combatants, or other belligerents, for the duration of a conflict. See Hamdi, 2002 WL 1483908, at *5. For example, in Ex parte Quirin, 317 U.S. 1, 30-31 (1942) (emphasis added and footnotes omitted), the Supreme Court stated:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

See id. at 31 n.8 (citing authorities); Duncan v. Kahanamoku, 327 U.S. 304, 313-314 (1946); In re Territo, 156 F.2d 142, 145 (9th Cir. 1946); Ex parte Toscano, 208 F. 938, 940 (S.D. Cal. 1913).[4]

[4] The practice of capturing and detaining enemy combatants is as old as war itself. See A. Rosas, The Legal Status of Prisoners of War 44-45 (1976). "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released." Territo, 156 F.2d at 146 (footnotes omitted). The capture and detention of enemy combatants also serves other vital military objectives, including the critical and age-old objective of obtaining intelligence from captured combatants to aid in the war effort. At the same time, once individuals are taken into control as enemy combatants, they are protected from harm or other reprisals, given medical care, and are treated humanely.

As the court of appeals recognized in this case, it also is settled that the military's authority to detain an enemy combatant is not diminished by a claim, or even a showing, of American citizenship. See Hamdi, 2002 WL 1483908, at *5 (parenthetical discussing Quirin, 317 U.S. at 31, 37); see also Quirin, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful."); Territo, 156 F.2d at 144 ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."); Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) ("[T]he petitioner's citizenship in the United States does not * * * confer upon him any constitutional rights not accorded any other belligerent under the laws of war."), cert. denied 352 U.S. 1014 (1957). To be sure, the fact that such a combatant has American citizenship may enable him to proceed with a habeas action that could not be brought by an alien combatant (cf. Johnson v. Eisentrager, 339 U.S. 763 (1950)), but it does not affect the Executive's settled authority to detain him as an enemy combatant.

The United States military has captured and detained enemy combatants during the course of virtually every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. As the court of appeals has recognized, "[t]he unconventional aspects of the present struggle do not make its stakes any less grave," and they do not, as the court further held, diminish the military's settled authority to capture and detain enemy combatants in connection with that conflict. Hamdi, 2002 WL 1483908, at *5.[5]

[5] As Quirin makes clear, the military's authority to capture and detain enemy combatants exists regardless of whether they are "lawful" or "unlawful" combatants under the laws and customs of war. Quirin, 317 U.S. at 30-31; see p. _, supra (quoting Quirin). In any event, the President has determined that al Qaida and the Taliban are unlawful combatants. See United

2 As an enemy combatant, the military's "present detention" of Hamdi is "lawful." Hamdi, 2002 WL 1483908, at *5, even though he has not been "charged with an offense" or "provided counsel." Pet. ¶ 19. There is no obligation under the laws and customs of war for captors to charge combatants with an offense (whether under the law of war or domestic law); indeed, a significant number, if not the vast majority, of those seized in war are never charged with any offense but instead are simply detained during the conflict. Similarly, there is no general right under the laws and customs of war for those detained as enemy combatants to be provided counsel. Even under the Third Geneva Convention – which does not afford protections to unlawful enemy combatants, such as the detainee here, see note 5, supra – prisoners of war have no right of access to counsel to challenge their detention. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135 (GPW), Article 105.[6]

The Constitution does not supply any different guarantee. The Sixth Amendment by its terms applies only in the case of "criminal prosecutions," U.S. Const. amend. VI, and therefore does not apply to the detention of any enemy combatant who – like most such combatants – has not been charged with any crime. Cf. Middendorf v. Henry, 425 U.S. 25, 38 (1976) ("[A] proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a

States v. Lindh, __ F.Supp.2d __, 2002 WL 1489373, at *8-*11 (E.D. Va. July 11, 2002). As noted above, Hamdi was captured as part of a Taliban unit. Mobbs Decl. ¶ 4.

[6] Article 105 of the GPW provides that a prisoner of war should be provided with counsel to defend against charges brought against him in a trial proceeding at least two weeks before the opening of such trial. But the availability of that general trial right only underscores that prisoners of war who do not face such charges are not entitled to counsel, or access to counsel, simply to challenge the fact of their wartime detention.

00000042

traditional civilian criminal trial."). Similarly, the Self-Incrimination Clause of the Fifth Amendment is a "trial right of criminal defendants," and therefore also does not extend to this situation. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (emphasis added). The only possible remaining source of a right to charges or counsel is the Due Process Clause.

Any suggestion of a generalized due process right under the Fifth Amendment could not be squared with, inter alia, the historical unavailability of any right to prompt charges or counsel for those held as enemy combatants. Cf. Herrera v. Collins, 506 U.S. 390, 407-408 (1993); Medina v. California, 505 U.S. 437, 445-446 (1992); Moyer v. Peabody, 212 U.S. 78, 84 (1909); see also Colepaugh, 235 F.2d at 432; Ex parte Toscano, 208 F. at 943. As the Supreme Court stated in Quirin, 317 U.S. at 27-28, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." Moreover, if the Court were to consider the creation of some entirely new right under the Fifth Amendment in this case, the Court would have to balance the creation of such a right against the government's own interests, including the President's plenary authority as Commander in Chief and the important national security interests implicated by allowing access to counsel to enemy combatants. See, e.g., Middendorf, 425 U.S. at 42-43; id. at 45-46; id. at 49-51 (Powell, J., joined by Blackmun, J., concurring). Accordingly, even the most general due process analysis would not support a claim that Hamdi's "present detention" is unlawful because he has not been charged or provided counsel.[7]

[7] In addition, the Supreme Court has rejected the argument that due process entitles state prisoners to counsel in seeking post-conviction relief, even in capital cases. See Pennsylvania v. Finley, 481 U.S. 551 (1987); Murray v. Giarratano, 492 U.S. 1 (1989) (plurality opinion); see also United States v. Gouveia, 467 U.S. 180 (1984) (no right to counsel during period of

00000043

3 Similarly, nothing in 18 U.S.C. 4001 precludes Hamdi's detention as an enemy combatant. That provision – entitled "Limitation on detention; control of prisons" – states:

> (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
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> (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations.
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> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates, and provide for their rehabilitation, and reformation.

18 U.S.C. 4001. Although the petition does not mention Section 4001(a), petitioners raised it before the court of appeals and relied on it at oral argument before the Fourth Circuit. The court of appeals specifically inquired about Section 4001(a)'s application to this case, see Tr. of June 25, 2002 Arg. at 18-19, and yet reached the proper conclusion that Hamdi's "present detention" is "lawful" as long as he is properly classified as an enemy combatant. Hamdi, 2000 WL 1483908, at *5.

First, nothing in Section 4001 suggests that Congress sought to intrude upon the "long * * * established" authority of the Executive to capture and detain enemy combatants in war time. Hamdi, 2000 WL 1483908, at *5; see id. at *3 ("The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2."). To the contrary, Section 4001 by its terms is addressed to the control of civilian prisons and related detentions. Indeed, subsection (b) explicitly addresses the "control and management of Federal penal and correctional institutions," and exempts from its coverage "military or naval institutions." 18 U.S.C. 4001(b).

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administrative detention).

Subsection (a), the provision cited by petitioners in the court of appeals, cannot be read without reference to the immediately surrounding text. See Owasso Indep. Sch. Dist. v. Falvo, 122 S. Ct. 934, 939-940 (2002) ("'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"); accord Tyler v. Cain, 533 U.S. 656, 662-663 (2001); Jones v. United States, 527 U.S. 373, 388 (1999). And, particularly when the provision is read as a whole, there is no basis for concluding that Section 4001 was in any way addressed to the military's detention of enemy combatants.

Second, even if Section 4001 were susceptible to a different interpretation, this Court's duty would be to adopt the facially reasonable – if not textually compelled – interpretation that Section 4001 is addressed to civilian rather than military detentions. As the Supreme Court has held, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Jones v. United States, 529 U.S. 848, 857 (2000); accord Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council, 485 U.S. 568, 575 (1988). The longstanding canon of constitutional avoidance independently forecloses any interpretation of Section 4001(a) that would extend it to interfere with the longstanding authority of the President as Commander in Chief and the armed forces to detain enemy combatants during war time. Petitioners' proposed reading of Section 4001(a) would directly interfere with the President's ability to detain an enemy combatant who claims citizenship. That situation arose in World War II, see Quirin, supra; Terlo, supra, and has now arisen again. A Court should not infer that a provision that is explicitly addressed to civilian detentions meant to override that long-established and vital war time authority of the Executive.

Third, and in any event, the detention at issue is authorized by at least two different Acts of Congress. First, as the court of appeals specifically noted (Hamdi, 2000 WL 1483908, at *3, *5), the challenged Executive actions in this case fall within Congress's express statutory authorization to the President "to use force against those 'nations, organizations, or persons he determines' were responsible for the September 11 terrorist attacks." Hamdi, 2002 WL 1483908, at *5 (quoting 115 Stat. 224; emphasis added by court of appeals). Second, Congress has appropriated funding to the Department of Defense to pay for the expenses incurred in connection with "the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war." 10 U.S.C. 956(5); see 10 U.S.C. 956(4) (appropriating funding for the "issue of authorized articles to prisoners and other persons in military custody"). By explicitly funding the detention of "prisoners of war" and persons – such as enemy combatants – "similar to prisoners of war" Congress has plainly authorized the military detention of such combatants. Therefore, Section 4001(a) does not in any way bar the military detention of enemy combatants such as Hamdi.

In sum, as long as Hamdi "is indeed an 'enemy combatant,'" then – as the Fourth Circuit already has established in this case – his "present detention" is "lawful." Hamdi, 2000 WL 1483908, at *5. Because the petition itself does not challenge the military's determination that Hamdi is an enemy combatant, but instead raises legal challenges that were considered and rejected, inter alia, by the Supreme Court in Quirin, petitioners' due process claims fails on its own terms. In any event, as explained in Part C, infra, even if the petition had challenged Hamdi's enemy combatant status (or if petitioners attempt to do so now), the military has properly determined that Hamdi is an enemy combatant and, as a matter of law, that determination satisfies any appropriate standard of review.

00000046

B. The President's Order Of November 13, 2001 Is Not Applicable To Hamdi And Has Not Resulted In Any Suspension Of The Writ

In addition to the alleged violation of due process, the only other claim raised by the petition is the legal claim that, to the extent that the President's Military Order of November 13, 2001 (see Pet., Exh. C) forecloses judicial review of Hamdi's detention via habeas, "the Order and its enforcement constitute an unlawful suspension of the Writ." Pet. ¶ 25. That claim, too, fails as a matter of law. By its terms, the President's November 13, 2001 Order applies only to non-citizens whom the President determines "in writing" to be subject to his Order. See Military Order § 2(a). The President has made no such written determination with respect to Hamdi, who is alleged to be an American citizen. Therefore, the President's Military Order has absolutely no application to Hamdi in his present situation. That is a sufficient basis to reject the petition's second claim as a matter of law. But in any event, the very fact of this habeas proceeding underscores that there has been no "Suspension of the Writ." Pet. ¶ 25. The writ of habeas corpus remains available to individuals, such as Hamdi, who are detained as enemy combatants to challenge the legality of their detention. Petitioners' challenges to Hamdi's detention as inconsistent with the Due Process Clause and 18 U.S.C. 4001(a) fail for the reasons explained above, but they involve a classic use of the writ to challenge the legality of detention, just as, for example, the Quirin petitioners employed the writ to raise similar – and similarly unavailing – claims.

C. As A Matter Of Law, The Military Has Properly Determined That Hamdi

00000047

Should Be Detained As An Enemy Combatant

Although the petition does not specifically challenge the military's determination that Hamdi is an enemy combatant, it is clear that such determination is proper and, as a matter of law, is entitled to be given effect by the courts under any appropriate standard of review.

1. The Fourth Circuit already has made clear in this case that the tremendous deference owed to the political branches in matters involving foreign relations and national security "extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle." Hamdi, 2002 WL 1483908 at *3 (emphasis added). The court further emphasized that "the standard for reviewing the government's designation of Hamdi as an enemy combatant" is shaped by "[s]eparation of powers principles," and "must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, from additional unprovoked attack." Id. at *5.

Indeed, the Executive's determination that someone is an enemy combatant and should be detained as such is one of the most fundamental military judgments of all. See Hirota v. MacArthur, 338 U.S. 197, 215 (1949) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.") (Douglas, J., concurring); cf. Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (determinations with respect to how to treat enemy aliens "when the guns are silent but the peace of Peace has not come * * * are matters of political judgment for which judges have neither technical competence nor official responsibility"); Eisentrager, 339 U.S. at 789 ("Certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the

00000048

Commander-in-Chief in sending our armed forces abroad or to any particular region." And the Judiciary, as the Fourth Circuit has recognized, lacks institutional competence in making such military judgments. See Hamdi, 2002 WL 1483908 at *5 ("The executive is best prepared to exercise the military judgment attending the capture of alleged combatants."); see also Thomasson, 80 F.3d at 926 ("[T]he lack of competence on the part of the courts [with respect to military judgments] is marked) (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)); Tiffany, 931 F.2d at 278.

2. The sworn declaration appended hereto explaining the military's determination that Hamdi is an enemy combatant readily satisfies any constitutionally appropriate standard of judicial review in this extremely sensitive and important realm of Executive decisionmaking. Proper respect for separation of powers and the appropriate division of responsibilities between the judicial and executive branches may well limit the courts to the consideration of legal attacks on detention of the type considered in Quirin and Territo (and raised by petitioners here and discussed in Parts A and B, supra). At most, however, in light of fundamental separations of powers concerns, a court's proper role in a habeas proceeding such as this would be to confirm that there is a factual basis supporting the military's determination that the detainee is an enemy combatant. This return and the accompanying declaration more than satisfy that standard of review.

Indeed, in evaluating habeas challenges to analogous – but much less constitutionally sensitive – executive determinations, courts have refused to permit use of the writ to challenge the factual accuracy of such determinations, and instead call upon the Executive only to show "some evidence" supporting its determination. See, e.g., INS v. St. Cyr, 533 U.S. 289, 306 (2001) (deportation order: "Until the enactment of the 1952 Immigration and Nationality Act, the sole

00000049

means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive.") (citations omitted); Eagles v. United States, 329 U.S. 304, 312 (1946) (selective service determination: "If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, or that there was no evidence to support the order, the inquiry is at an end.") (citations omitted); United States v. Commissioner, 273 U.S. 103, 106 (1927) (deportation order: "Upon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced."); Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (extradition order: "[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."). The focus of the inquiry is thus the Executive's determination, and the court's role is limited to confirming that there was a basis for that determination, and not to undertake a de novo determination for itself.

Mover v. Peabody, 212 U.S. 78 (1909), is also instructive in this connection. There, the Court considered the due process challenge of a person who had been detained without probable cause for months by the governor of Colorado acting in his capacity of "commander-in-chief of the state forces" during a local "state of insurrection." Id. at 82. In rejecting that challenge, Justice Holmes, writing for a unanimous Court, explained: "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had

00000050

not reasonable ground for his belief." Id. at 85; see also United States v. Salerno, 481 U.S. 739, 748 (1987) ("[I]n times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous.") (citing Mover); United States v. Chalk, 441 F.2d 1277, 1282 (4th Cir.) ("It is enough, we think, that there was a factual basis for the mayor's decision to proclaim the existence of a state of emergency and that he acted in good faith.") (citing Mover), cert. denied, 404 U.S. 943 (1971).[8]

The basic considerations underlying the limited scope of judicial review of the sorts of executive determinations underlying the foregoing cases are only magnified in a case such as this, involving a challenge to the military's determination that someone seized in the middle of active hostilities in a foreign land is an enemy combatant. And so too, at a bare minimum, the military's determination that an individual is an enemy combatant should be respected by the courts as long as the military shows some evidence for that determination. Any more demanding standard would

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[8] Judicial deference to executive branch determinations is hardly unique. For example, in suits brought under the Administrative Procedure Act (APA), 5 U.S.C. 500 et seq., to challenge executive agency actions, the standard of judicial review is "a narrow, highly deferential one," see, e.g., Bagdonas v. Department of Treasury, 93 F.3d 422, 425 (7th Cir. 1996) (citing 5 U.S.C. S 706(2)(A)), bordering on a presumption that the action taken is valid, see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), overruled on other grounds, 430 U.S. 99, 97 S. Ct. 980 (1977); accord Comsat Corp. v. National Science Foundation, 190 F.3d 269, 278 (4th Cir. 1999) (in APA cases, courts "defer to the agency's judgment, recognizing * * * that federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do * * * [because] [o]ur Constitution vests such responsibilities in the political branches.") (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984)). The APA standard of review does not permit a reviewing court to "substitute [its] judgment for that of the agency." See, e.g., Hearrwood, 230 F.3d 947, 953 (7th Cir. 2000). Instead, the court must affirm the action if the agency's "decision was supported by a 'rational basis.'" Bagdonas, 93 F.3d at 425-26. Although the standard of review appropriate with respect to the type of military determination at issue in this case is far more deferential than anything under the APA, the APA example underscores the typically hands-off approach of the Judiciary when it comes to reviewing executive decisionmaking.

00000051

disregard the compelling separations of powers concerns recognized by the court of appeals in this case and unnecessarily invite the "special hazards of judicial involvement in military decision-making" foreseen by the court of appeals. As the Fourth Circuit recognized, "allowing alleged combatants to call American commanders to account in federal courtrooms would stand the warmaking powers of Article I and II on their heads." Hamdi, 2000 WL 1483908, at *6. At the same time, applying a heightened standard would risk "a conflict between judicial and military opinion highly comforting to enemies of the United States." Eisentrager, 339 U.S. at 779.

Respondents here have provided a more than ample factual basis to support the military's determination that the detainee in this case is an enemy combatant. The Mobbs Declaration explains the relevant events surrounding Hamdi's capture and detention. In particular, the declaration explains that: Hamdi went to Afghanistan to train with and, if necessary, fight for the Taliban; he remained with the Taliban after September 11, 2001, and after the United States military campaign began in Afghanistan in October 2001; and he was captured when his Taliban unit surrendered to – and, indeed, laid down arms to – Northern Alliances forces. Mobbs Decl. ¶¶ 3-5, 9.[9] The declaration further explains that the military determined that Hamdi should be detained as an enemy combatant based on interrogations with Hamdi in which Hamdi himself stated that he went to Afghanistan to train with the Taliban and that he turned over his assault rifle to Northern Alliance

[9] The fact that Hamdi was undisputably seized in the midst of hostile territory occupied by al Qaida and Taliban is itself significant. See Pet. ¶ 9 ("Hamdi resided in Afghanistan" when he was seized.); cf. Miller v. United States, 78 U.S. 268, 310-311 (1870) (In the context of determining rights to confiscated property, Court stated "[i]t is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in the war, though they are subjects of neutral states, or even subjects or citizens of the government prosecuting the war against the state within which they reside."); Lamar, Executor v. Browne, 92 U.S. 187, 194 (1875) ("In war, all residents of enemy country are enemies.").

forces. Id. ¶¶ 5, 9. The Mobbs Declaration amply supports the military's determination that Hamdi is an enemy combatant and, therefore, that Hamdi is being lawfully detained as such.

3. No further factual development or evidentiary proceedings are necessary to dispose of the petition. Under the deferential inquiry discussed above, a court's role is limited to evaluating whether the Executive has shown some factual basis for its decision. A court is not to review, or to second-guess, the particular facts relied upon the Executive in making its decision. In particular, in the context in which this case arises, there is no basis for a court to conduct evidentiary proceedings with respect to any of the particular facts or circumstances surrounding an individual's capture as an enemy combatant, effectively opening the door for "alleged enemy combatants to call American commanders to account in federal court rooms." Hamdi, 2000 WL 1483908, at *5. The Court's proper role does not permit it to call members of the United States military back from the front, or to somehow attempt to bring into the courtroom the Northern Alliance forces who accepted Hamdi's surrender. Nor would it be proper to call Hamdi himself to court and, thus, seriously jeopardize important national security interests related to intelligence gathering. There is no need for an attempt at recreation or de novo examination of the circumstances surrounding Hamdi's capture on a foreign battlefield. The relevant issue is whether the United States military had a factual basis for treating Hamdi as an enemy combatant. This return and the accompanying declaration readily demonstrate that the military had such a basis, and that is the end of the inquiry.

Similarly, because the exclusive focus is on whether the military had a factual basis for its determination, there is no need for an attorney to have access to a detained enemy combatant to see if the detainee disputes any of the facts relied upon by the military. That conclusion is bolstered further by the urgent national interests that would be jeopardized by allowing attorneys to have

access to detained enemy combatants. First, such access would directly interfere with – and likely thwart – efforts of the United States military to gather and evaluate intelligence about the enemy, its assets, and its plans, and its supporters. Such intelligence is critical to the successful prosecution of any war effort and, in the present conflict, in all likelihood already has avoided additional harm to American lives or interests on the home front. Second, such access may enable detained enemy combatants to pass concealed messages to the enemy about military detention facilities, the security at such facilities, or other military operations – something that members (and presumably supporters) of al Qaida are trained to do. See Al Qaida Manual, www.usdoj.gov:80/ag/trainingmanual.htm.

Collecting and assessing intelligence is one of the most important duties of the Commander in Chief, especially in wartime. See United States v. Marchetti, 466 F.2d 1309, 1315 (4th Cir.) ("[g]athering intelligence information" is "within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces"), cert. denied, 409 U.S. 1063 (1972); see also Snepp v. United States, 444 U.S. 507, 512 n.7 (1980) (per curiam) ("It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence."). Especially when there is no need whatever for such access to dispose as a matter of law of a habeas petition such as this, a court should refuse to overstep the fundamental separation of powers principles discussed above and jeopardize vital national security interests in intelligence gathering.

D. Response To This Court's Own Queries Of July 18, 2002

On July 18, 2002, this Court ordered respondents to include in their response to the petition answers to three questions listed below that are not raised in the petition. See Tr. of July 18, 2002 Hrg. at 5-7; see id. at 7 (The answers to the Court's questions "will be provided in the answer that

the government is to file to the petition."). That sua sponte request for information relevant to theories not raised by the petition is difficult to square with the restraint typically exercised by the courts in reviewing challenges, such as this case, arising "in the context of foreign relations and national security." Hamdi, 2000 WL 1483908, at *3; see id. at *6 ("Our Constitution's commitment of the conduct of war to the political branches of American government requires the court's respect at every step."). In addition, this Court's own queries cannot alter the claims presented by the petition giving rise to this case. In any event, as explained below, the answers to the Court's inquiries further confirm that Hamdi is being lawfully detained as an enemy combatant.

1. The Court inquired "why * * * if [Hamdi] is possibly an American citizen, he can have visitors but not one of them be a lawyer." Tr. of July 18, 2002 Hrg. at 5. That query was addressed to press reports indicating "that all of the United States citizens who were being held or those people who may have had United States citizenship were not held incommunicado, according to press reports, and were having visitors." Ibid. A recent article in The Virginia Pilot reported on a panel discussion at a state bar association meeting. See C. Kahn, Federal Prosecutors Defend Handling of Terrorism Suspects, The Virginia Pilot (July 14, 2002). The comments to which the Court presumably referred appeared to have been directed to individuals held pursuant to criminal charges, material witness warrants, or immigration violations, and not those held as enemy combatants.[10]

Individuals who are detained by the military as enemy combatants, including Hamdi, are allowed only official contacts – i.e., government and military officials and representatives from the

[10] Although Mr. McNulty, United States Attorney for the Eastern District of Virginia, spoke at the state bar association meeting reported by the article, the comments to which the Court appears to have been referring were made by another Department of Justice official, as the article indicates.

International Committee of the Red Cross. No other visitors are allowed. As discussed above, the military has generally determined that allowing other visitors – including lawyers – to have access to detained enemy combatants would jeopardize national security interests by interfering with ongoing intelligence gathering efforts and possibly allowing detainees to pass concealed messages about, inter alia, the security in the facilities where they have been detained. See p. 20, supra. Detained enemy combatants are permitted to send and receive mail to and from family members. Due to national and institutional security concerns, all mail is screened.

2. The Court inquired whether, if Hamdi is being held in "solitary confinement," "would due process apply to him." Tr. of July 18, 2002 Hrg. at 6. As discussed above, the Fourth Circuit has held that Hamdi's "present detention" is "lawful" as long as he is an enemy combatant. Hamdi, 2000 WL 1483908, at *5. Presently, Hamdi is not being held in solitary confinement, as that term is normally understood. He is, however, the only enemy combatant detained in the Norfolk Naval Brig and, pursuant to 10 U.S.C. 812, is not confined in "immediate association" with members of the United States armed forces. There is no factual dispute about this, but any legal challenge to the conditions of Hamdi's confinement would fail as a matter of law. The military's decision to separate Hamdi from any others at the Norfolk Naval Brig does not trigger any additional layer of due process review. Determinations about the appropriate conditions of confinement for an individual properly held as an enemy combatant are committed to the military. Even if Hamdi were subject to the same due process protections applicable to typical prison inmates, however, no due process violation would result from separating him from the main prison population (or in limiting his visitation) when, as here, the reasons for those restrictions are related to obviously legitimate security and

00000056

prison management concerns.[11] A fortiori, those types of conditions would not raise any different or meritorious, due process claim with respect to the type of sensitive military detention at issue here.

3. Finally, the Court inquired about the unconventional aspects of the present conflict. See Tr. of July 18, 2002 Hrg. at 7 ("[W]ith whom is [the United States] fighting," and "how would [the war] ever end if there is no government or organization with one can deal."). The fighting in Afghanistan has focused on al Qiada and the Taliban, but, as Congress's Joint Resolution Authorizing the Use of Military Force underscores, the current conflict at a minimum involves the "nations, organizations, or persons he [i.e., the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." 115 Stat. 224. With respect to when the conflict will end, the key point is that there is no dispute that the United States is presently engaged in active hostilities. As a result, even if cessation of hostilities and the continued need to detain enemy combatants were matters for judicial inquiry, the concern that hostilities might persist indefinitely is clearly premature here.

More generally, the Supreme Court has expressly recognized that questions concerning the

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[11] Even in the civilian prison context, courts have afforded prison officials broad latitude to restrict visitation rights of both convicted inmates and pretrial detainees. See Block v. Rutherford, 468 U.S. 576, 585-589 (1984); Bell v. Procunier, 417 U.S. 817, 822-828 (1974). Even for pretrial detainees, who have not been convicted of any crime, prison officials are afforded great deference to impose restrictions, as long as they are reasonably related to a legitimate security concern. Bell v. Wolfish, 441 U.S. 520, 536-540 (1979). The same is true for segregation from other prisoners, as long as the segregation is not for punitive reasons, but merely for administrative or security concerns, as is true here. Higgs v. Carver, 286 F.3d 437, 438 (7th Cir. 2002) (pretrial detainees have no due process right to avoid administrative segregation), citing Bell v. Wolfish, 441 U.S. 520 (1979); Sandin v. Conner, 515 U.S. 472, 485 (1995) (30-day disciplinary segregation of convicted prisoner not subject to due process where it was not a "dramatic departure from the basic conditions of [the prisoner's] * * * sentence").

00000057

cessation of hostilities or the scope of armed conflict are committed to the political branches. See, e.g., Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (Whether a state of "war" exists is a "matter[] of political judgment for which judges have neither technical competence nor official responsibility."); United States v. The Three Friends, 166 U.S. 1, 63 (1887) ("[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted."); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) ("Whether the President * * * has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department"). The unconventional nature of the war in which the Nation is currently engaged only heightens the need for judicial deference to the determination of the political branches with respect to such judgments.

In any event, as the Fourth Circuit has recognized – and as the savage attack of September 11 underscores – "[t]he unconventional aspects of the present struggle do not make its stakes any less grave." Hamdi, 2000 WL 1483908, at *5. Nor, as the Fourth Circuit's recent decision also makes clear, does the unconventional nature of the conflict in any way diminish the military's "established" authority lawfully to detain Hamdi as an enemy combatant. See ibid.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus should be dismissed.

Respectfully submitted,

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Attorneys for Respondents

Dated: July 25, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Respondents' Response to and Motion to Dismiss the Petition for Writ of Habeas Corpus was served, this 25th day of July, 2002, by hand delivery addressed to:

Larry W. Shelton
Supervisory Assistant Federal Public Defender
Geremy C. Kamens
Assistant Federal Public Defender
Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510

Lawrence R. Leonard
Managing Assistant United States Attorney

Declaration of Michael H. Mobbs
Special Advisor to the Under Secretary of Defense for Policy

Pursuant to 28 U.S.C. § 1746, I, Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

1. I am a Special Advisor to the Under Secretary of Defense for Policy. In this position, I have been substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban). I have been involved with detainee operations since mid-February 2002 and currently head the Under Secretary of Defense for Policy's Detainee Policy Group.

2. I am familiar with Department of Defense, U.S. Central Command and U.S. land forces commander policies and procedures applicable to the detention, control and transfer of al Qaeda or Taliban personnel in Afghanistan during the relevant period. Based upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of Yaser Esam Hamdi and his detention by U.S. military forces.

3. Yaser Esam Hamdi traveled to Afghanistan in approximately July or August of 2001. He affiliated with a Taliban military unit and received weapons training. Hamdi remained with his Taliban unit following the attacks of September 11 and after the United States began military operations against the al Qaeda and Taliban on October 7, 2001.

4. In late 2001, Northern Alliance forces were engaged in battle with the Taliban. During this time, Hamdi's Taliban unit surrendered to Northern Alliance forces and he was transported with his unit from Konduz, Afghanistan to the prison in Mazar-e-Sharif, Afghanistan which was under the control of the Northern Alliance forces. Hamdi was directed to surrender his Kalishnikov assault rifle to Northern Alliance forces en route to Mazar-e-Sharif and did so. After a prison uprising, the Northern Alliance transferred Hamdi to a prison at Sneberghan, Afghanistan, which was also under the control of Northern Alliance forces.

5. While in the Northern Alliance prison at Sheberghan, Hamdi was interviewed by a U.S. interrogation team. He identified himself as a Saudi citizen who had been born in the United States and who entered Afghanistan the previous summer to train with and, if necessary, fight for the Taliban. Hamdi spoke English.

EXHIBIT
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6. Al Qaeda and Taliban were and are hostile forces engaged in armed conflict with the armed forces of the United States and its Coalition partners. Accordingly, individuals associated with al Qaeda or Taliban were and continue to be enemy combatants. Based upon his interviews and in light of his association with the Taliban, Hamdi was considered by military forces to be an enemy combatant.

7. At the Sheberghan prison, Hamdi was determined by the U.S. military screening team to meet the criteria for enemy combatants over whom the United States was taking control. Based on an order of the U.S. land forces commander, a group of detainees, including Hamdi, was transferred from the Northern Alliance-controlled Sheberghan prison to the U.S. short-term detention facility in Kandahar. Hamdi was in-processed and screened by U.S. forces at the Kandahar facility.

8. In January 2002, a Detainee Review and Screening Team established by Commander, U.S. Central Command reviewed Hamdi's record and determined he met the criteria established by the Secretary of Defense for individuals over whom U.S. forces should take control and transfer to Guantanamo Bay.

9. A subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant.

MICHAEL H. MOBBS
Special Advisor to the
Under Secretary of Defense for Policy

Dated: 24 July 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi, Petitioners, v. DONALD RUMSFELD Secretary of Defense COMMANDER W.R. PAULETTE, Norfolk Naval Brig Respondents.	)	CASE NO. 2:02CV439

PETITIONER'S TRAVERSE AND RESPONSE TO RESPONDENTS' MOTION TO DISMISS

Introduction

Respondents' arguments pose a grave threat to the constitutional rights of American citizens. Under the guise of the President's power to act as Commander in Chief of the armed forces, Respondents seek to strip from those they label as "enemy combatants" the protections ordinarily afforded to all citizens under the Bill of Rights of the Constitution. In Petitioner Hamdi's case, Respondents propose to do this on the basis of a sparse factual statement which raises more questions than it answers. *See* (Respondents' Response To, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus, Ex. 1) ("Resp."). Respondents even contend that there is no need for "further factual development or evidentiary proceedings . . . to dispose of this case." (Resp. at 20).

Respondents' argument is no different from the "sweeping proposition" criticized by the

Court of Appeals for the Fourth Circuit: "that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002). Here, Respondents rely upon the "say-so" of a lawyer, Michael H. Mobbs, who has no personal knowledge related to Petitioner Hamdi. And Respondents refuse to permit Petitioner Hamdi to reveal his account of his capture and detention. Aside from the inequity inherent in these circumstances, the position advanced by Respondents also would eliminate basic liberties required under the Constitution for all citizens: the right not to be detained indefinitely without due process, and the right not to be punished without due process.

The Mobbs Declaration is so inadequate on its face that this Court should grant a writ of habeas corpus on the basis of the record as its stands. Nonetheless, to the extent that the Court finds that the facts set forth in the Mobbs Declaration are sufficient to deny the issuance of a writ, Petitioner Hamdi must be permitted an opportunity to confront those facts and traverse them if he can.

As for the legal issues presented by this case, Respondents mischaracterize the breadth of Petitioner Hamdi's claims. Respondents contend that the underlying Petition raises a "challenge to the authority of the Commander in Chief and the military to detain an enemy combatant captured in the theater of battle in a foreign land in connection with an ongoing military campaign." (Resp. at 6). This hyperbole states a far broader proposition than the issue presented by Petitioner Hamdi.

The claims asserted by Petitioner Hamdi–an individual that Respondents do not dispute is an American citizen–pose no risk to the ability of the Executive Branch to prosecute military actions overseas. Indeed, Petitioner Hamdi's claim that he cannot be held indefinitely or punished without due process is not one that can be made by enemy aliens overseas. *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Nor does this claim implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan. Petitioner Hamdi challenges only his current indefinite imprisonment in the United States Naval Brig in Norfolk, Virginia. In other words, Petitioner Hamdi's claims have no practical

00000064

consequences for the conduct of the military overseas.

The relation between the Executive's conduct of military affairs and the continued indefinite detention of Petitioner Hamdi is relevant to the degree of deference to be afforded the Executive branch by this Court. Respondents mistakenly contend that deference to the President in his conduct of military affairs is unbridled, and that the circumstances at issue have no bearing on the measure of deference given to Executive conduct. But the deference invoked by Respondents is greatest when applied to the conduct of "military commanders engaged in day-to-day fighting in a theater of war," and much less forgiving when the President purports to exercise his power as Commander in Chief at home. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

Petitioner Hamdi is unable to object to Respondents' meager factual submission, including statements allegedly obtained from Petitioner Hamdi himself, because Respondents refuse to permit access to his appointed counsel. Nonetheless, the record is sufficient for this Court to: (1) conclude that Petitioner Hamdi must be released even if Respondents' characterization of his status as an "enemy combatant" is entirely accurate; (2) order Respondents to provide additional factual material in support of their decision to imprison Petitioner Hamdi.[1]

Procedural History

I. **Petition Filed on June 11, 2002**

On June 11, 2002, the underlying Petition for Writ of Habeas Corpus was filed on behalf of Yaser Esam Hamdi by his father as next friend. The Petition alleges that Petitioner Yaser Hamdi is a United States citizen, that he is being held by Respondents, and that he has not been charged with any criminal offense.

The same day that the Petition was filed, the Court entered an Order consolidating this action with the two previous actions filed on behalf of Yaser Esam Hamdi. The Court also found as a

[1] Petitioner in no way concedes that Respondents' factual assertions are true. For example, information about Petitioner Hamdi prior to his transfer to the custody of Respondents is based on the hearsay of unknown members of the Northern Alliance.

00000065

factual matter that the Petition for Writ of Habeas Corpus was properly filed on behalf of Petitioner Yaser Hamdi pursuant to *Whitmore v. Arkansas*, 495 U.S. 149 (1990), and appointed counsel to represent him under 18 U.S.C. § 3006A. Finally, after having heard substantial argument on this issue in the prior case, the Court ordered Respondents to file an Answer by 12:00 noon on June 17, 2002, and directed that: "Respondents allow either Frank Dunham or Larry Shelton from the Federal Public Defender's Office, as long as they possess the appropriate governmental security clearance, the opportunity to meet with Yaser Esam Hamdi within seventy-two hours of the entry of this Order or immediately following the elimination of any stay of this Order."

II. Interlocutory Appeal of the Court's June 11, 2002, Order

On June 13, 2002, Respondents filed a Notice of Appeal, an Emergency Motion for Temporary Stay Pending Consideration of Motion for Stay Pending Appeal, and an Emergency Motion for Stay Pending Appeal. The Court of Appeals for the Fourth Circuit granted Respondents' Emergency Motion for Temporary Stay, and directed Petitioners to file a Response to the Emergency Motion for Stay no later than 2:00 p.m. on June 14, 2002.

Petitioners filed their Response to Appellants' Emergency Motion within the specified time on June 14, 2002, and the Fourth Circuit granted Respondents' motion several hours later. In its June 14, 2002, Order, the court of appeals stayed "all proceedings before the district court in connection with this detainee" and set forth an expedited briefing schedule. Specifically, the Fourth Circuit directed Respondents to submit their brief on the merits by 12:00 noon on Wednesday, June 19, 2002, and permitted Petitioners to file a Response brief within twenty-four hours thereafter.

On July 12, 2002, the court of appeals issued an opinion reversing this Court's June 11, 2002, Order. Specifically, the court of appeals reversed the June 11, 2002, Order insofar as it required "access to counsel" and remanded the case for further proceedings. On July 18, 2002, this Court

00000066

entered an order setting forth a briefing and discovery schedule.[2]

Factual Conclusions

The Petition for Writ of Habeas Corpus alleges that Petitioner Hamdi is an American citizen who was born in Baton Rouge, Louisiana, on September 26, 1980. (Pet'n ¶¶ 2, 9.) Respondents do not deny that Petitioner Hamdi is an American citizen.

A. Afghanistan

1. Petitioner Hamdi is Not a Member of al-Qaida, and is not a Terrorist

According to both the Petition and the Mobbs Declaration, Petitioner Hamdi was captured by the Northern Alliance and transferred into the custody of the United States in the Fall of 2001 or late 2001, and "has been held in United States custody since that time without access to legal counsel or notice of any charges pending against him." (Pet'n ¶ 12.) In addition, according to the account of Petitioner Hamdi's conduct from the Mobbs Declaration, Petitioner Hamdi was with a unit of Taliban soldiers when he was captured. Mobbs ¶ 4. In other words, Respondents make no claim that Mr. Hamdi belonged to al-Qaida or any terrorist organization. Based on the record before it, the Court therefore can conclude that Petitioner Hamdi is not a member of al-Qaida, and is not a member of a terrorist organization.

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[2] Even though the Fourth Circuit has yet to issue its mandate, the absence of the mandate itself does not preclude this Court from addressing issues unrelated to the access question before the court of appeals. *See* (Pet. Resp. Refusal to File Rule 26 Disclosures at 2-3).

Respondents also object that the Fourth Circuit entered a stay of all proceedings pending the interlocutory appeal in this case. (Resp. at 5 n.3). Respondents have also cited Appellate Local Rule 8, which provides: "An order granting a stay or injunction pending appeal remains in effect until issuance of the mandate or further order of the Court and may be conditioned upon the filing of a supersedeas bond in the district court." 4th Cir. Local Rule 8.

Appellate Local Rule 8 acknowledges that a stay may dissolve upon "further order of the Court," and the Fourth Circuit's July 12, 2002, opinion may constitute such an order. Nonetheless, should this Court express concern that the Fourth Circuit's stay remains in effect, Petitioner is prepared to request that the Fourth Circuit issue an order that explicitly dissolves the stay entered on June 14, 2002.

00000067

2. The War with the Taliban Is Over

The Court requested Respondents to explain "with whom is the belligerent action taken . . . . And . . . how would it ever end?" July 18 Tr. at 6. To determine whether the armed conflict with the Taliban has concluded, the Court must "refer to some public act of the political departments of the government to fix the dates." *The Protector*, 79 U.S. 700, 702 (1871); *see also Ludecke v. Watkins*, 335 U.S. 160, 170 (1948); *The Prize Cases*, 67 U.S. 635, 670 (1862). On December 22, 2001, the United States recognized the newly installed government in Afghanistan. Amy Waldman, *New Leaders Set to Assume Power in Tranquil Kabul*, N.Y. Times, Dec. 22, 2001, at A1. The President also has recognized the change in regimes in both a Proclamation and a proposed regulation. *See* Amendment to the List of Proscribed Destinations in the International Traffic in Arms Regulations, 67 Fed. Reg. 44352 (July 2, 2002); Proclamation 7577 of July 17, 2002, 67 Fed. Reg. 47677 (July 19, 2002).

Most importantly, the President has terminated the national emergency declared to deal with the Taliban. *See* 64 Fed. Reg. 36759 (July 4, 1999). Pursuant to Executive Order 13268 of July 2, 2002, the President found that "the situation that gave rise to the declaration of a national emergency in Executive Order 13129 of July 4, 1999, with respect to the Taliban . . . has been significantly altered given the success of the military campaign in Afghanistan." 67 Fed. Reg. 44751. The President therefore "revoke[d] that order and terminate[d] the national emergency declared in that order with respect to the Taliban." *Id.*

The Executive branch has determined that the armed conflict with the Taliban has concluded. *Cf. Baker v. Carr*, 369 U.S. 186, 212 (1962) ("Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them . . . ."). Consequently, even if the Court accepts the facts as reflected in the Mobbs Declaration, Petitioner Hamdi is entitled to immediate release.

00000068

B. Detention in the Naval Brig in Norfolk

In January 2002, Respondents transported Petitioner Hamdi from Afghanistan to Guantanamo Bay, Cuba. (Pet'n ¶ 17.) In April 2002, Respondents moved Petitioner Hamdi again, this time to a military jail at the Norfolk Naval Station in Norfolk, Virginia. (Id. ¶ 19.) Respondents have not charged Petitioner Hamdi with any crime, and continue to deny him the means to contact counsel or challenge the legality of his detention. (Id.)

1. Petitioner Hamdi's Transfer to Norfolk, Virginia, Is Consistent With Criminal Proceedings Rather than Detention of Enemy Combatants

Absent from Respondents' Response is any explanation as to why Petitioner was moved from Guantanamo Bay, Cuba, where he was initially housed with other persons taken into custody by the U.S. military in Afghanistan. If Respondents simply intended to detain and question Petitioner Hamdi for purposes of intelligence gathering,[3] as they claim, there would be no need to transfer Petitioner Hamdi to the United States. Indeed, Respondents make no mention of the screening procedure that led to Petitioner Hamdi's present incarceration in Norfolk, Virginia. That screening procedure, however, also led Respondents to bring John Walker Lindh to the Eastern District of Virginia. In the absence of any explanation from Respondents, the circumstances of this case are inconsistent with the mere detention of an alleged enemy combatant.

2. The Conditions of Petitioner Hamdi's Confinement Are Consistent With Criminal Proceedings Rather than Detention of Enemy Combatants

Regulations governing the detention of captured enemy combatants–indeed, all persons taken into custody by the United States Armed Forces–are set forth in a joint service regulation entitled *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*. *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other*

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[3] Respondents never explain in the Mobbs Declaration or elsewhere why Petitioner Hamdi is particularly significant for purposes of their interest in intelligence gathering.

00000069

Detainees (Oct. 1, 1997) ["EPW Regulations"] (attached as Exhibit 1). This regulation implements codified and customary international law, including the Geneva Convention Relative to the Treatment of Prisoners of War, for the U.S. military. Petitioner Hamdi is not being treated in accordance with these regulations.

The EPW Regulations require that "[a]ll persons taken into custody by the U.S. forces will be provided the protections of the [1949 Geneva Convention Relative to the Treatment of Prisoners of War] until some other status is determined by competent authority. EPW Reg. 1-5(a)(2). Similarly, the EPW Regulations also provide: "In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the U.S. Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." EPW Reg. 1-6(a). As noted, these regulations reflect Article 5 of the Geneva Convention related to prisoners of war. Article 5 of the Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 ("GPW"). Pursuant to these provisions, a captured enemy combatant cannot be treated as anything other than an Enemy Prisoner of War ("EPW") until such a tribunal has determined an alternative status.

Respondents contend that Petitioner Hamdi is not entitled to treatment as an EPW, but do not claim to have provided a tribunal as required before Respondents may deny prisoner of war status to Petitioner Hamdi. Nor have Respondents complied with other provisions set forth in the EPW Regulations. For example, EPW Reg. 3-2(b) prohibits internment of persons in "correctional facilities housing military or civilian prisoners," "except in extreme circumstances, in the best interests of the individual."[4] EPWs also are not to be separated from other prisoners belonging to the armed forces with which they were serving at the time of their capture except with their consent.

[4] The EPW Regulations also require the roof of any internment facility to be marked with the letters "PW" denoting "Prisoner of War Camp," so as to be visible from the air. EPW Regs. 3-2(c).

00000070

Id. 3-4(b). Finally, EPWs must be quartered under conditions as favorable as those of the detaining power's forces in the same area. *Id.* 3-4(e). Respondents have not complied with these regulations. Petitioner Hamdi is not contesting the conditions of his confinement; on the contrary, Respondents' failure to comply with the regulations that are applied to combatants indicates that Petitioner Hamdi is being held for potential prosecution, not as a combatant.

3. Petitioner Hamdi is being Punished

Petitioner Hamdi is being held in solitary confinement. He has been isolated from others similarly situated in Afghanistan and Guantanamo Bay, Cuba. He is prohibited from sharing a cell or communicating with other inmates at the Naval Brig. He is prohibited from having visitors with the exception of a representative of the International Committee of the Red Cross. He cannot make contact by telephone. He is prohibited from group prayer and group recreation. This "exclusion from human associations" constitutes solitary confinement, a "punishment of the most important and painful character." *See In re Medley*, 134 U.S. 160, 168-71 (1890).

Respondents have also steadfastly refused to explain when the armed conflict that purportedly authorizes the application of the laws of war to Petitioner Hamdi will end. The continuation of armed conflict with al-Qaida has no bearing on the propriety of Respondents' detention of Petitioner Hamdi, not only because Petitioner Hamdi has no connection to al-Qaida but also because the laws of war do not apply to the conflict between the United States and a non-state actor.[5] The conclusion of the conflict with the Taliban therefore constitutes the end of armed conflict for purposes of the authorization under international law to detain combatants. Respondents reticence to address this issue, moreover, illustrates Respondents' position that the duration of the Petitioner Hamdi's detention indeed may be unlimited.

[5] Because al Qaida is not a nation state, the President has announced that the Geneva Conventions do not apply to the conflict with this terrorist organization.

00000071

Argument

1. **Judicial Review Must Ensure Compliance with the Constitution While Affording Due Deference to the Executive**

Brandishing the deference often afforded to the Executive's conduct of military affairs, Respondents contend that this Court need only "confirm that there is a factual basis supporting the military's determination that [Petitioner Hamdi] is an enemy combatant." Resp. at 16. Respondents' argument not only is inconsistent with the deference due the Executive branch in accordance with the separation of powers, it also implies the very unchecked power to imprison American citizens that was criticized by the Fourth Circuit. The judicial deference given to the Executive branch varies by the context in which the Executive purports to act. Here, the legality of Petitioner Hamdi's imprisonment cannot be determined simply by rubber-stamping Respondents' classification of Petitioner as an enemy combatant.

It is not contested that "[a]n important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942). At the same time, the decision to detain an American citizen pursuant to this authority is undoubtedly reviewable by the Court. *See Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002); *see also Quirin*, 317 U.S. at 27-28 ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.").[6]

[6] Respondents cite *Hirota v. MacArthur*, 338 U.S. 197 (1948) (Douglas, J., concurring), for the proposition that the propriety of the detention of combatants is a political question. Resp. at 15. Justice Douglas said nothing of the kind in *Hirota*. A dissenter in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), Justice Douglas explained in *Hirota*:

> If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least, the Constitution follows the flag. . . . It is our Constitution which he supports and defends. If there is evasion or violation of its obligations, it is no defense that he acts for another nation.
> I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action one of our Generals holds a prisoner in his custody, the writ of *habeas corpus* can effect a release from that custody.

338 U.S. at 204. The critical difference for the petitioners in *Hirota* was that the President had entered into an agreement with the Allied Powers to establish an International Military Tribunal. And because the President had "made arrangements with other nations for [the petitioners'] trial, he act[ed] in a political role on a military matter." Justice Douglas thus concluded that "[h]is discretion cannot be reviewed by the judiciary." *Id.* at 209.

00000072

"[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.'" *United States v. Robel*, 389 U.S. 258, 263-64 (1967); *cf. Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."). These comments reflect a long-standing suspicion of conduct by the Executive branch under the guise of national security that infringes upon constitutional rights. *Cf. Duncan v. Kahanamoku*, 327 U.S. 304, 319 (1946) ("In this country that fear [of military rule] has become part of our cultural and political institutions."). As the Supreme Court has explained, "[i]t is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." *Raymond v. Thomas*, 91 U.S. 712, 716 (1875).

Even when "martial law" is declared, the conduct of the Executive branch is subject to judicial review. *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."). Furthermore, as the Supreme Court explained in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the geography of the Executive branch's authority to infringe upon individual liberties under martial law is limited by necessity:

> Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also

00000073

> confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be "mere lawless violence."

Id. at 127; *see also Duncan v. Kahanamoku*, 327 U.S. at 326 (Murphy, J., concurring) ("Tested by the *Milligan* rule, the military proceedings in issue plainly lacked constitutional sanction.")

Likewise, the deference afforded to the Executive branch's decision to detain an American citizen diminishes by the degree to which the detention is unrelated to foreign policy, national security, or military affairs. *See Ex parte Endo*, 323 U.S. 283, 302 (1944). Put differently, judicial deference to the Executive branch is greatest with respect to the conduct of "military commanders engaged in day-to-day fighting in a theater of war," and much less forgiving when the President purports to exercise his power as Commander in Chief at home. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

> [N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

Id. at 642 (Jackson, J., concurring). Even while World War II was in progress, the Supreme Court emphasized that "[w]hen the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized." *Ex parte Endo*, 323 U.S. at 302. The Court therefore must examine the context of the Executive branch's exercise of its power in order to determine how much deference should be given to that exercise.

As noted by the court of appeals, "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional

00000074

unprovoked attack." *Hamdi*, 2002 WL 1483908, at *5. This observation is consistent with an acknowledgment that issues related to national security "merit the most careful consideration." *United States v. U.S. District Court*, 407 U.S. 297, 319 (1972).

Because this case involves an American citizen, however, it has very few implications for the Executive branch's conduct of military affairs against our enemies. For example, Petitioner's claims have no relation to the treatment of enemy aliens, who are not entitled to constitutional protections. *Eisentrager*, 339 U.S. at 785. Similarly, Petitioner Hamdi has challenged his indefinite imprisonment by Respondents in this country, not the propriety of his temporary detention abroad. As explained below, these claims are constitutionally distinct and are drawn from different locations within the Constitution.

Respondents also liken this case to the deference afforded by courts in their review of an agency decision. In the administrative context, however, deference to administrative determinations is the result of a congressional delegation of authority to the agency. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Congress has not, and could not, delegate the customary international law-making power to the military.

Even if the Court sought to apply principles from the administrative context, courts do not defer when Congress "has directly spoken to the precise question at issue." *Chevron U.S.A. v. Nat. Resources Def. Council*, 467 U.S. 837, 842 (1984). As explained below, it has. *See* 18 U.S.C. § 4001(a).

Finally, deference is not warranted in the administrative context when a litigating position is "wholly unsupported by regulations, rulings, or administrative practice." *Smiley v. Citibank*, 517 U.S. 735, 741 (1996). Respondents' treatment of Petitioner Hamdi, in fact, is unsupported by the ostensibly applicable regulations applied by all branches of the United States military. *See* EPW Regulations. These regulations have no provision for "unlawful combatants," or even "enemy combatants" for that matter. *Cf. Hamdi*, 2002 WL 1483908, at *4 ("Indeed, the order does not mention the term enemy combatant at all."). More importantly, these regulations provide that "all

00000075

person detained by the United States Armed Forces receive prisoner of war protection regardless of whether they are entitled to prisoner of war status under the [Geneva Conventions]." Capt. Vaughn A. Ary, *Accounting for Prisoners of War: A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, 1994 Army Lawyer 16, 17 (Aug. 1994) (citing EPW Regulations ¶ 1-5). Respondents' decision to depart from these regulations certainly does not support a finding that Respondents' classification decision is entitled to substantial deference.

The Court of Appeals for the Fourth Circuit declined to address the "standards and procedures that should govern this case." *Hamdi*, 2002 WL 1483908, at *5. The appellate court simply noted that caution is warranted given that this case arises "in the context of foreign relations and national security." *Id.* at *3. Indeed, Respondents' detention of Petitioner is "not to be set aside by the courts without a clear conviction that [it is] in conflict with the Constitution or laws of Congress constitutionally enacted. *Quirin*, 317 U.S. at 25. At the same time, however, the court of appeals warned that Respondents do not have the power to detain a citizen "indefinitely without charges or counsel on the government's say-so." *Hamdi*, 2002 WL 1483908, at *5. In sum, while the questions raised by the Petition require a degree of "deference to the political branches," that deference should not be allowed to prevent Petitioner from adducing evidence to establish a "clear conviction that [his imprisonment is] in conflict with the Constitution [and] laws of Congress constitutionally enacted." *Quirin*, 317 U.S. at 25.

II. Petitioner Hamdi's Constitutional Rights Outweigh The Government's Interest in Inteligence Gathering

A. Petitioner Hamdi's Citizenship Entitles Him To Assert Constitutional Protections

American citizenship distinguishes Petitioner Hamdi from others charged as "enemy combatants," and entitles him to assert constitutional protections against indefinite detention and punishment without due process. Respondents' allegation that Petitioner Hamdi fought on behalf of the Taliban is insufficient to strip Petitioner Hamdi of these significant protections. Likewise,

00000076

Respondents' invocation of the customary laws of war does not mean that Petitioner Hamdi's imprisonment is consistent with the Constitution.[7]

Unlike aliens, American citizens are entitled to the protections of the Constitution both in the United States and abroad. *See Reid v. Covert*, 354 U.S. 1, 32-33 (1957) ("[The view that] constitutional safeguards do not shield a citizen abroad when the Government exercises its power over him . . . is erroneous. The mere fact that [the defendants] had gone overseas . . . should not reduce the protection the Constitution gives them."); *see also Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 244-48 (1960) (refusing to permit military prosecution of citizen who was not a member of the United States armed forces). In *Eisentrager*, the Supreme Court explicitly distinguished the rights of citizens from those of enemy aliens, explaining that war "exposes the relative vulnerability of the alien's status." 339 U.S. at 772.[8] Specifically, the *Eisentrager* court rejected the application of Fifth Amendment rights to enemy aliens abroad. *Id.* at 782-85.

The Supreme Court in *Eisentrager* did not address the question whether a citizen fighting on behalf of a belligerent would be entitled to constitutional protections. But if status as an "enemy

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[7] In a statement unnecessary to the holding of its July 12, 2002, opinion, the Court of Appeals for the Fourth Circuit observed that "[i]t has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Hamdi*, 2002 WL 1483908, at *5. Respondents wrongly contend that this conclusion is the law of the case. Resp. at 7. Statements or observations unrelated to the court of appeals' holding do not become law of the case. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994)("It is to the holdings of our cases, rather than their dicta that we must attend."); *California v. Rooney*, 483 U.S. 307, 312-14 (1987) (dismissing writ of certiorari as improvidently granted on ground that issue was not squarely before lower court); *Creek v. Village of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998) (noting that dicta does not become law of the case). In addition, because the political branches of the government have declared that the armed conflict with the Taliban has ended, and because Petitioner Hamdi is entitled to constitutional protections regardless of his status as an enemy combatant, the Fourth Circuit's dictum is inaccurate.

[8] Even during wartime, however, "enemy aliens" within the United States are not for that reason necessarily divested of rights. *See Von Moltke v. Gillies*, 332 U.S. 708, 740 (1948) (Burton, J., dissenting) ("Her status as an enemy alien does not, in itself, affect her right to counsel or the informed character of her plea of guilty and her waiver of counsel"); *Ex parte Kawato*, 317 U.S. 69, 78 (1942) (holding that enemy aliens residing in the United States are not denied access to courts); *cf. Eisentrager*, 339 U.S. at 775 ("The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists.").

00000077

combatant" were sufficient in itself to eliminate protections ordinarily afforded under the Constitution, the *Eisentrager* court's discussion of citizenship would make little sense. In other words, if enemy combatants are by definition unprotected by the Constitution, the Supreme Court need not have addressed the issue of citizenship at all in order to reach the conclusion that the petitioners in *Eisentrager*, all of whom were unquestionably enemy combatants, could not assert rights under the Fifth Amendment.

In *Ex Parte Quirin*, of course, the Supreme Court stated that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is *unlawful because in violation of the law of war*." 317 U.S. at 37 (emphasis added). The petitioners in *Quirin* were accused of secretly entering the United States to engage in sabotage operations. As explained by the Court, these allegations charged a violation of the laws of war:

> The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Id. at 31. Accordingly, the petitioners in *Quirin* were subject to trial by military tribunal. *See id.* at 28; 10 U.S.C. § 821. But the fact that a citizen may be tried by a military tribunal for an offense in violation of the law of war has nothing to do with Petitioner Hamdi's challenge to his imprisonment. It does not mean that citizens accused as "enemy combatants" are indistinguishable from aliens who are so charged.

Moreover, Respondents do not assert that Petitioner Hamdi committed any offense against the law of war analogous to the petitioners in *Quirin*. Instead, Respondents claim that Petitioner Hamdi is not entitled to prisoner of war status because he "was captured as part of a Taliban unit." Resp. at 9 n.5. An individual who is not entitled to prisoner of war status, however, is not necessarily an "unlawful combatant." *See* Alan Rosas, The Legal Status of Prisoners of War 311

00000078

(1976) ("In legal literature the term 'unlawful' (or 'unprivileged') combatant is sometimes used with respect also to such individual members of armed forces, who have forfeited their right to be treated as prisoners of war. In order to assess the desirability of such terminology, one should consider separately the situation of a spy, a person guilty of war crimes in general, and a person who has carried a perfidious attack under civilian disguise (saboteur, etc.)"). By the same token, "lawful combatants are always entitled to prisoner of war status, while the reverse is not necessarily true." *Id.* at 305.

Whether or not Petitioner Hamdi is entitled to prisoner of war status, and whether or not he would be subject to the jurisdiction of a military tribunal, he is entitled to constitutional protections like any other citizen. *See Reid*, 354 U.S. at 32-33; *Kinsella*, 361 U.S. at 244-48; *Eisentrager*, 339 U.S. at 772. Respondents' position that Petitioner Hamdi has no greater rights than if he were an enemy alien is simply inconsistent with this precedent and the significance of citizenship under our laws.

The importance of citizenship in this context is also reflected in a congressional statute, 18 U.S.C. § 4001(a). That statute provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." § 4001(a). The plain language of the statute prohibits the detention or imprisonment of citizens by the United States "except" by congressional legislation, and the other sub-paragraphs contained in the statute do not diminish the force of that language. *See* §§ 4001(b)(1) & (2).

Should the Court have any question as to the application of this statute to Respondents' conduct, the legislative history establishes that Congress sought to prohibit Respondents from engaging in the precise conduct challenged here. *See Chemehuevi Tribe of Indians v. Federal Power Comm.*, 420 U.S. 395, 405 (1975) (resorting to legislative history). In particular, Congress enacted § 4001(a) in 1971 "to prohibit the establishment of emergency detention camps and to provide that no citizen of the United States shall be committed for detention or imprisonment *in any facility of the United States Government* except in conformity with the provisions of title 18." H.R. No. 92-

00000079

116, at 1434 (1971) (emphasis added). Likewise, the purposes set out in the relevant House report explain that the enabling legislation is designed to: "(1) to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists; and (2) to repeal the Emergency Detention Act of 1950 (Title II of the Internal Security Act of 1950) which both authorizes the establishment of detention camps and imposes certain conditions on their use." *Id.*

In an effort to avoid the plain language and intent of this statute, Respondents urge the Court not to construe it in a manner that would "interfere with the longstanding authority of the President as Commander in Chief and the armed forces to detain enemy combatants during war time." Resp. at 12. In fact, Respondents suggest that a broad reading of § 4001(a) would implicate "grave and doubtful constitutional questions," and therefore that it should not be read to apply to "military detentions."

It is difficult to see how this statute would impose any serious obstacle to the Executive branch's conduct of military affairs. Indeed, a construction of the statute that authorized the indefinite detention of citizens by the military in the United States would appear to raise even more grave constitutional questions than those postulated by Respondents. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (rejecting reading of alien detention statute that would permit indefinite incarceration). Nonetheless, to the extent that application of the statute would hinder the conduct of military operations against citizens abroad, Respondents' argument suggests only that Congress did not intend § 4001(a) to apply outside the United States. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"). Accordingly, by bringing Petitioner Hamdi to the United States, Respondents are the architects of the conflict between their imprisonment of Petitioner Hamdi and 18 U.S.C. § 4001(a).

Respondents also urge that their incarceration of Petitioner Hamdi is consistent with

00000080

§ 4001(a) because of the congressional authorization permitting the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States . . . ." Act of Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001). Similarly, Respondents suggest that Petitioner Hamdi's indefinite incarceration is authorized by a statute that appropriate funds related to the detention of prisoners of war. 10 U.S.C. § 956. These arguments are without merit.

Neither of these statutes contain any language explicitly authorizing the detention of citizens. In a similar context, the Supreme Court has explained that the broad power to detain citizens advanced by Respondents can be found only in clear and unmistakable terms:

> We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

See Ex parte Endo, 323 U.S. at 300. The statutes cited by Respondents certainly do not contain clear and unmistakable language authorizing detention. In fact, the statutes cited by Respondents do not even "use the language of detention." *Id.* In violation of 18 U.S.C. § 4001(a), Petitioner Hamdi's incarceration simply has no basis in congressional act.

B. Petitioner Hamdi's Imprisonment Violates His Constitutional Right to Due Process of Law

Respondents maintain that as a result of the customary international legal authority to detain combatants, Petitioner Hamdi enjoys no constitutional protection against indefinite imprisonment. (Resp. at 10). This parsimonious approach to the Constitution ignores both text and precedent.

00000081

The Due Process Clause of the Fifth Amendment prohibits the Government from "depriving" any person of liberty "without due process of law." U.S. Const. amend. V. "[G]overnment detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections . . . or, in certain special and 'narrow' non-punitive 'circumstances.'" *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Accordingly, "the serious constitutional problem" raised by Respondents' asserted power to impose "an indefinite, perhaps permanent, deprivation of human liberty without any such [Due Process] protection is obvious." *Id.* at 692.

Petitioner Hamdi does not assert that the Constitution prohibited his custody by Respondents at all times. *See Ex parte Endo*, 323 U.S. at 301 ("We do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. . . Some such power might indeed be necessary to the successful operation of the evacuation program."). The Petition therefore asserts no claim against unreasonable seizure under the Fourth Amendment. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 47 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *Fisher v. Washington Metropolitan Area Transit Auth.*, 690 F.2d 1133, 1140 n.10 (4th Cir. 1982). To be sure, the Executive branch's temporary detention of citizens during an emergency may be consistent with the Constitution. *Compare Moyer v. Peabody*, 212 U.S. 78, 85 (1909), *with Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J., concurring) ("[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.").

Whatever the case with respect to temporary detention, however, long term indefinite imprisonment poses a separate constitutional issue. *Moyer*, 212 U.S. at 85 (noting that case involving extended detention may "raise a different question" then temporary detention at issue); *see also Fisher*, 690 F.2d at 1140 n.10. That separate issue is presented by Respondents' indefinite imprisonment and punishment of Petitioner Hamdi. *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1978) (holding that Due Process prohibits "punishment" of pretrial detainees); *In re Medley*, 134 U.S. 160, 171 (1890) (finding that solitary confinement constituted punishment). Petitioner Hamdi

00000082

therefore has asserted nothing "new . . . under the Fifth Amendment." (Resp. at 10).

Also familiar is the potential conflict between Petitioner Hamdi's constitutional liberties and Respondents' broad exercise of Executive power. As the Supreme Court explained in *United States v. Robel*, 389 U.S. 258 (1967), when the exercise of an "enumerated power[] clashes with those individual liberties protected by the Bill of Rights, it is [the Federal Judiciary's] 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." *Id.* at 264; *see also United States District Court*, 407 U.S. at 299 (explaining that constitutionality of Executive branch's electronic surveillance for purposes of domestic security required "sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion"); *cf.* (Resp. at 10) ("the Court would have to balance the creation of such a right against the government's own interests"). At the same time, the Court should remain mindful that the "concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *Robel*, 389 U.S. at 264.

Respondents have offered almost no explanation for their continued detention of Petitioner Hamdi other than their assertion that his confinement may aid their intelligence gathering efforts. Such efforts are not sufficient to justify indefinite detention. *Cf. Youngstown Sheet & Tube*, 343 U.S. at 646 (Jackson, J., concurring) ("What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment."). Indeed, the Government's desire to "fortify its intelligence collage" simply does not outweigh the considerable constitutional interests of American citizens at issue here. *United States District Court*, 407 U.S. at 325 (Douglas, J., concurring).

00000083

Furthermore, the rights asserted by Petitioner Hamdi do not threaten to "unduly frustrate the efforts of Government" to act abroad. *United States District Court*, 407 U.S. at 315. As described above, the underlying claims reflect the fact that the context in which the Executive branch exercises its power affects the strength of the Executive's authority. *Youngstown Sheet & Tube Co.*, 343 U.S. at 587. The longer that Respondents imprison Petitioner Hamdi without due process, the weaker is their claim to the imposition of that authority, and the stronger is Petitioner Hamdi's challenge that his imprisonment violates the Constitution. At this point, affording respect to Petitioner Hamdi's constitutional claims is more intrinsic to the "concept of 'national defense'" than Respondents' claimed authority under international law.

III. International Law Does Not Authorize Petitioner Hamdi's Continued Detention

Aside from Petitioner Hamdi's constitutional claims, his imprisonment also is unsupported by the customary international law invoked by Respondents. The Executive branch concedes that the Geneva Conventions apply to those individuals who fought on behalf of the former Taliban regime in Afghanistan.[9] Respondents' authority to imprison those combatants therefore terminates upon evidence that hostilities with the Taliban are over. *See Hamdi*, 2002 WL 1483908, at *4 ("it has been the government's contention that Hamdi is an 'enemy combatant' and as such 'may be detained at least for the duration of the hostilities.'").

Federal courts have no independent authority to pronounce when a war begins or ends, and Petitioner Hamdi therefore does not contend that the judiciary has the authority to tell the Executive branch when to announce that the undeclared war on the Taliban regime in Afghanistan is at a close. But this Court certainly can determine whether the political branches have spoken on the issue. *Baker v. Carr*, 369 U.S. 186, 212 (1962) ("Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court

[9] See White House Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), at <http://www.whitehouse.gov/news/releases/2002/02/>.

00000084

may construe them . . . ."). Because many legal rights turn on the existence or non-existence of war, the Supreme Court often has been asked to make such a determination. *See, e.g., Lincoln v. United States*, 197 U.S. 419 (1905); *Dooley v. United States*, 182 U.S. 222 (1901).

In the *Prize Cases*, for example, the simple question before the Court was "whether a state of war existed." 67 U.S. at 665. To answer this question, the Court explained that "this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." *Id.* at 670; *accord Ludecke*, 335 U.S. at 171. The Court then held that the President's proclamation of a blockade was sufficient evidence that a state of armed conflict existed. 67 U.S. at 670. Likewise, in *The Protector*, 79 U.S. 700 (1871), the Supreme Court looked to "public act[s]" of the political departments to determine the beginning and end dates of the Civil War.

Accordingly, the Court's question regarding the end date for the armed conflict that Respondents allege gives them the authority to detain combatants points to a significant issue: whether Petitioner Hamdi is properly detained under the laws of war as a captured combatant who was affiliated with the former Taliban regime in Afghanistan. To answer this question, the Court should determine whether the political branches of government have spoken on the issue.

They have. On December 23, 2001, the United States recognized the newly installed government in Afghanistan. Amy Waldman, *New Leaders Set to Assume Power in Tranquil Kabul*, N.Y. Times, Dec. 22, 2001, at A1. As noted above, the President also has recognized in both a Proclamation and in proposed regulations that there has been a change of regimes in Afghanistan. *See* Amendment to the List of Proscribed Destinations in the International Traffic in Arms Regulations, 67 Fed. Reg. 44352 (July 2, 2002); Proclamation 7577 of July 17, 2002, 67 Fed. Reg. 47677 (July 19, 2002).

And the President has terminated the national emergency initially declared by President Clinton specifically to address the Taliban regime in Afghanistan. *See* 64 Fed. Reg. 36759 (July 4, 1999). Pursuant to Executive Order 13268 of July 2, 2002, the President concluded that "the

00000085

situation that gave rise to the declaration of a national emergency in Executive Order 13129 of July 4, 1999, with respect to the Taliban . . . has been significantly altered given the success of the military campaign in Afghanistan." 67 Fed. Reg. 44751. The President therefore "revoke[d] that order and terminate[d] the national emergency declared in that order with respect to the Taliban." *Id.*

These public pronouncements demonstrate that the Executive branch has announced the conclusion of the armed conflict with the Taliban. Respondents' claim that hostilities remain "ongoing" is irrelevant to this conclusion. *See Lincoln*, 197 U.S. at 429 ("The fact that there was an insurrection of natives not recognized as belligerents in another part of [the Philipines] . . . did not give the President power to impose duties on imports" that he levied pursuant to his powers as Commander in Chief during war with Spain after war's conclusion). Similarly, the Executive branch's ongoing efforts to eliminate the terrorist organization al Qaida has no bearing on the conclusion of an "international armed conflict" between nation-states that triggered the application of the Geneva Conventions. Joan Fitzpatrick, *Military Commissions: Jurisdiction of Military Commissions and th eAmbiguous War on Terrorism*, 96 Am. Jrnl. Int'l L. 345, 346 (Apr. 2002). Consequently, even if the Court accepts the facts as reflected in the Mobbs Declaration, Petitioner Hamdi is entitled to immediate release.

00000086

Conclusion

Wherefore, Petitioner Hamdi respectfully requests that the Court deny Respondents' Motion to Dismiss, and order other appropriate relief in accordance with 28 U.S.C. § 2243.

Respectfully submitted,

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00000087

CERTIFICATE OF SERVICE

I certify that on this 30th day of July, 2002, a copy of the foregoing was hand-delivered to Lawrence R. Leonard, Managing Assistant United States Attorney, at the Office of the United States Attorney, Eastern District of Virginia, Norfolk Division, World Trade Center, 101 W. Main, Suite 8000, Norfolk, VA 23510

Geremy C. Kamens
Assistant Federal Public Defender

Exhibit 1

Exhibit 1

Army Regulation 190–6
OPNAVINST 3461.6
AFJI 31-304
MCO 3461.1

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

Headquarters
Departments of the Army,
the Navy, the Air Force,
and the Marine Corps
Washington, DC
1 October 1997

UNCLASSIFIED

SUMMARY of CHANGE

AR 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1
Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees -

This revision--

- Establishes a multi-service regulation for all services (para 1-4a).
- Ensures compliance with DOD Directive 2310.1 dated August 1994 (para 1-4g).
- Establishes HQDA, Deputy Chief of Staff for Operations as the primary Army Staff responsibility for the Enemy Prisoner of War, Civilian Internee and Retained Persons Program (para 1-4c).
- Establishes a DD FORM 2745, Enemy Prisoner of War(EPW) Capture Tag (para 2-1b).
- Highlights Combatant Commanders, Task Force Commanders and Joint Task Force Commanders responsibilities (para 1-4g).
- Establishes procedures for conducting tribunals (para 1-6).
- Establishes Public Affairs policy (para 1-9).
- Establishes policy for EPW held aboard ship (para 2-1b).
- Updates OCONUS evacuation policy (para 2-3).
- Establishes the use of Health and Comfort Packs as a temporary substitution for Advance of Pay for short term operations (para 3-4h).
- Updates procedures for contracting EPW (para 4-22).
- Combines AR 190-8 and AR 190-57 (para 6-1).

00000092

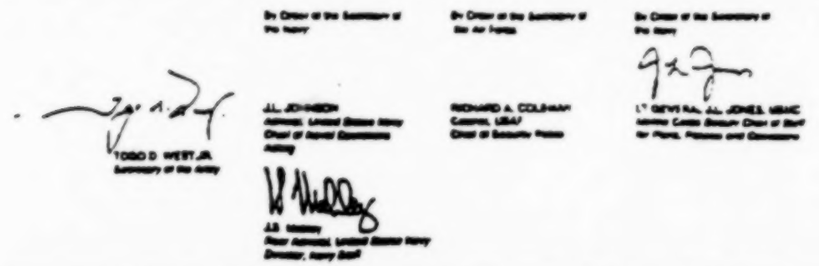
Headquarters
Departments of the Army,
the Navy, the Air Force,
and the Marine Corps
Washington, DC
1 October 1997

*Army Regulation 190–8
*OPNAVINST 3461.6
*AFJI 31–304
*MCO 3461.1

Effective 1 November 1997

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees



History. This printing publishes a revision of this publication. Because the publication has been extensively revised the changed portions have not been highlighted.

Summary. This regulation implements Department Of Defense Directive 2310.1 and establishes policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for Enemy Prisoners of War, Civilian Internees, Retained Persons, and Other Detainees. This regulation is a consolidation of Army Regulation 190-8 and Army Regulation 190-57 and incorporates SECNAV Instruction 3461.3 and Air Force Joint Instruction 31-304. Policy and procedures established herein apply to the services and their capabilities to the extent that they are resourced and organized for enemy prisoner of war operations.

Applicability. This is a multi-service regulation. It applies to the Army, Navy, Air Force and Marine Corps and to their Reserve components when lawfully ordered to active duty under the provisions of Title 10 United States Code.

Proponent and exception authority. The proponent of this regulation is the Deputy Chief of Staff for Operations and Plans. The proponent has the authority to approve exceptions to this regulation that are consistent with controlling law and regulation. Proponents may delegate the approval authority, in writing, to a division chief within the proponent agency in the grade of colonel or the civilian equivalent.

Army management control process. The Regulation contains management control provisions in accordance with AR 11-2, but does not contain checklists for conducting management control. Reviews are used to accomplish assessment of management controls.

Supplementation. Army supplementation of this regulation and establishment of command or local forms is prohibited without prior approval from HQDA (DAMO-ODL), WASH DC 20310. Navy, Marine Corps and Air Force supplementation of this regulation is authorized, but is not required. If supplements are issued, major or second echelon commands will furnish one copy of each supplement to their headquarters, as follows: Navy, to the Chief of Naval Operations (N511), 2000 Navy Pentagon, Washington DC 20350-2000, Marine Corps, to the Commandant of the Marine Corps, HQ USMC (POS-10) 2 Navy Annex, Washington DC, 20380-1775 11), and Air Force, to HQ USAF/SPO, 1340 Air Force Pentagon, Washington, DC 20330-1340.

Suggested improvements. Users are invited to send comments and suggested improvements through channels as follows: HQDA (DAMO-ODL), WASH DC 20310-0440.

Distribution. *Army*: Distribution of this regulation is made in accordance with initial distribution number (IDN) 092120, intended for command levels A, B, C, D, and E for Active Army, Army National Guard, U. S. Army Reserve.
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00000093

Contents (Listed by paragraph and page number)

Chapter 1
Introduction, *page 1*
Purpose • 1–1, *page 1*
References • 1–2, *page 1*
Explanation of abbreviations and terms • 1–3, *page 1*
Responsibilities • 1–4, *page 1*
General protection policy • 1–5, *page 2*
Tribunals • 1–6, *page 2*
The National Prisoner of War Information Center (NPWIC) • 1–7, *page 3*
The Branch PWIC • 1–8, *page 3*
Public Affairs • 1–9, *page 4*

Chapter 2
Beginning of Captivity EPW/RP, *page 4*
Initial actions upon capture • 2–1, *page 4*
Evacuation and care of EPW and RP • 2–2, *page 5*
Evacuation Policy • 2–3, *page 5*

Chapter 3
Administration and Operation of EPW Internment Facilities, *page 5*
Establishment • 3–1, *page 5*
EPW internment facilities • 3–2, *page 5*
EPW Facility Management • 3–3, *page 5*
Operation of prisoner of war internment facilities • 3–4, *page 6*
Procedures for prisoner of war correspondence • 3–5, *page 7*
Discipline and security • 3–6, *page 9*
Punitive Jurisdiction • 3–7, *page 10*
Judicial proceedings • 3–8, *page 10*
Loss or damage to property • 3–9, *page 11*
Death and burial • 3–10, *page 11*
Transfer of prisoners of war • 3–11, *page 12*
Repatriation of sick and wounded EPW/RP • 3–12, *page 13*
Repatriation of other EPW/RP • 3–13, *page 14*
Repatriation transfer procedures • 3–14, *page 14*
Retained personnel • 3–15, *page 14*
Complaints and requests to camp commanders • 3–16, *page 15*
EPW/RP safety program • 3–17, *page 15*

Chapter 4
Employment and Compensation for EPWs, *page 15*

Section I
General Policy and Guidelines, page 15
General principles • 4–1, *page 15*
Restricted employment • 4–2, *page 15*
Liability to perform labor • 4–3, *page 15*
Authorized work • 4–4, *page 16*
Unauthorized work • 4–5, *page 16*
Decisions on work conditions and safeguards • 4–6, *page 16*
Referrals to HQDA, ODCSOPS • 4–7, *page 16*
Length of workday • 4–8, *page 16*
Rest periods • 4–9, *page 17*
Responsibility for work supervision • 4–10, *page 17*
Work detail leaders and interpreters • 4–11, *page 17*
Task system • 4–12, *page 17*
Employing EPW • 4–13, *page 17*
Paid work • 4–14, *page 17*
Restriction on paid work • 4–15, *page 17*
Rates for paid work • 4–16, *page 17*
Days of paid work per month • 4–17, *page 18*
Unpaid work • 4–18, *page 18*
Sale of articles and repair services • 4–19, *page 18*
Disability compensation • 4–20, *page 18*
Operation of government vehicles • 4–21, *page 18*

Section II
Contract Employment, page 18
Rules and procedures • 4–22, *page 18*

Chapter 5
Beginning of Internment (CI), *page 18*
General protection policy—civilian internee • 5–1, *page 18*
Civilian Internee Safety Program • 5–2, *page 19*
Republic of Korea/United States Agreement on processing civilian internees in Korea • 5–3, *page 19*

Chapter 6
Administration and Operation of CI Internment Facilities, *page 19*
Internment Facility • 6–1, *page 19*
Administrative processing • 6–2, *page 20*
Personal effects • 6–3, *page 20*
Internee Committee • 6–4, *page 21*
Supplies • 6–5, *page 21*
Medical Care and Sanitation • 6–6, *page 22*
Social, Intellectual, and Religious activities • 6–7, *page 22*
Procedures for communications • 6–8, *page 23*
Complaints and requests to camp commanders and protecting power • 6–9, *page 24*
Discipline and security • 6–10, *page 24*
Provisions common to disciplinary and judicial punishments • 6–11, *page 25*
Disciplinary proceedings and punishments • 6–12, *page 25*
Judicial proceedings • 6–13, *page 26*
Death and burial • 6–14, *page 27*
Transfers • 6–15, *page 27*
Release • 6–16, *page 28*

Chapter 7
Employment and Compensation—Civilian Internees, *page 28*
General • 7–1, *page 28*
Ability to perform labor • 7–2, *page 28*
Authorized work • 7–3, *page 28*
Unauthorized work • 7–4, *page 28*
Working conditions • 7–5, *page 28*
Length of workday • 7–6, *page 28*
Day of rest • 7–7, *page 28*
Paid work • 7–8, *page 28*
Unpaid work • 7–9, *page 28*
Compensation for paid work • 7–10, *page 29*
Disability compensation • 7–11, *page 29*

Appendixes
A. References, *page 30*
B. Internment Serial Numbers, *page 31*

Glossary

Index

00000094

Chapter 1
Introduction

1–1. Purpose

a. This regulation provides policy, procedures, and responsibilities for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces. This regulation also establishes procedures for transfer of custody from the United States to another detaining power.

b. This regulation implements international law, both customary and codified, relating to EPW, RP, CI, and ODs which includes those persons held during military operations other than war. The principal treaties relevant to this regulation are:

(1) The 1949 Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS).

(2) The 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GWS SEA).

(3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW).

(4) The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC), and in the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.

1–2. References

Required and related publications and prescribed and referenced forms are listed in appendix A.

1–3. Explanation of abbreviations and terms

Abbreviations and special terms used in this regulation are explained in the glossary.

1–4. Responsibilities

a. The Secretaries of the Military Departments. The Secretaries will—

(1) Develop internal policies and procedures consistent with this regulation in support of the Department of Defense (DOD), EPW/CI and other detainee programs.

(2) Ensure that appropriate training, as required, pursuant to DOD Directive 5100.77 is provided so that the principles of the Geneva Conventions, and the rights and obligations thereunder, are known by members of their service.

(3) Ensure that suspected or alleged violations of the international law of war are promptly reported and investigated per DOD Directive 5100.77.

(4) Conduct a periodic review of the EPW, CI and RP Program and training to ensure compliance with the law of war.

b. The Secretary of the Army (SA). The Secretary of the Army is the DOD Executive Agent (EA) for administering the DOD EPW, CI and RP Program. The SA, in coordination with the Assistant Secretary of Defense, International Security Affairs (ASD-ISA), will plan and develop the policy and coordinate the operation of the programs.

c. The Army Deputy Chief of Staff for Operations and Plans (DCSOPS). DCSOPS has primary Headquarters, Department of the Army (HQDA) staff responsibility for the EPW, CI and RP programs. The DCSOPS will—

(1) Develop and disseminate policy guidance for the treatment, care, accountability, legal status, and processing of EPW, CI, RP, and ODs.

(2) Report suspected or alleged violations of law committed by or against military personnel or civilians.

(3) Provide HQDA staff supervision for National Prisoner of War Information Center (NPWIC).

(4) Develop plans for the initial assignment and replacement of block internment serial numbers (ISNs) from the NPWIC to the Branch PWIC and for the assignment of the theater color section of the ISN.

(5) Provide necessary reports, coordination, technical advice, and staff assistance to:

(a) The Office of the Secretary of Defense (OSD).
(b) The Joint Chiefs of Staff (JCS).
(c) The military departments.
(d) Unified commands.
(e) Department of State and other Federal agencies.
(f) The International Committee of the Red Cross (ICRC).
(g) Protecting powers.

d. The Army Judge Advocate General (TJAG). The TJAG will provide HQDA guidance and advice to commanders on the legal aspects of the EPW, CI and RP program. TJAG will—

(1) Conduct liaison in coordination with the ASA-ISA, the Department of State, the Department of Justice, and other Federal agencies; the JCS; the Defense Intelligence Agency (DIA); the military departments; the ICRC; the Protecting Powers; and other detaining powers, as required.

(2) Provide advice and assistance to commanders on legal aspects of reported violations by EPW, CI, RP, and ODs.

(3) Provide theater guidelines for any EPW, CI and RP claims against the U.S. Government.

(4) Provide guidance regarding GPW Article 5 Tribunals.

e. Deputy Chief of Staff for Logistics (DCSLOG). The DCSLOG will ensure logistical resources are available to support EPW operations.

f. The Assistant Secretary of the Army Financial Management (ASA-FM&C). The ASA-FM&C will establish the policies and procedures governing entitlement, control, and accounting for pay, allowances, and personal funds for EPW, CI, RP, and ODs per the provisions of the GPW and GC.

g. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders have the overall responsibility for the EPW, CI and RP program, operations, and contingency plans in the theater of operation involved to ensure compliance with international law of war. DOD Directive 2310.1 provides that persons captured or detained by the U.S. Military Services shall normally be handed over for safeguarding to U.S. Army Military Police, or to detainee collecting points or other holding facilities and installations operated by U.S. Army Military Police as soon as practical. U.S. Army Military Police have units specifically organized to perform the long-term functions associated with EPW/CI internment. Commanders must ensure the proper force structure is included in any joint operational plans. Commanders at all levels will ensure that all EPW, CI, RP, and ODs are accounted for and humanely treated, and that collection, evacuation, internment, transfers, release, and repatriation operations are conducted per this regulation. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders will—

(1) Provide for an EPW, CI and RP camp liaison and assistance program to ensure the protection of U.S. interests per the Geneva Conventions upon the capture and transfer of EPW, CI, RP, and ODs to a host or other nation.

(2) Plan and procure logistical support to include: transportation, subsistence, personal, organizational and Nuclear, Biological & Chemical (NBC) clothing and equipment items, mail collection and distribution, laundry, and bath for EPW, CI and RP.

(3) Collect and dispose of captured enemy supplies and equipment through theater logistics and Explosive Ordnance Disposal (EOD) channels.

(4) Coordinate for acquisition of real estate, and as required, for planning, design, contracting, and construction of facilities for EPW, CI and RP with the Theater or JTF Engineer.

(5) Establish guidance for the use, transport, and evacuation of EPW, CI, RP, and ODs in logistical support operations.

(6) Identify requirements and allocations for Army Medical units in support of the EPW, CI and RP Program, and ensure that the

00000095

medical annex of OPLANs, OPORDs and contingency plans includes procedures for treatment of EPW, CI, RP, and ODs. Medical support will specifically include:

(a) First aid and all sanitary aspects of food service including provisions for potable water, pest management, and entomological support.

(b) Preventive medicine.

(c) Professional medical services and medical supply.

(d) Reviewing, recommending, and coordinating the use and assignment of medically trained EPW, CI, RP and OD personnel and medical material.

(e) Establishing policy for medical repatriation of EPW, CI and RP and monitoring the actions of the Mixed Medical Commission.

h. U. S. Army Criminal Investigation Command (USACIDC) USACIDC will provide criminal investigative support to EPW, CI and RP Camp Commanders per AR 195-2.

1–5. General protection policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence.

d. Photographing, filming, and video taping of individual EPW, CI and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of EPW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command.

e. A neutral state or an international humanitarian organization, such as the ICRC, may be designated by the U.S. Government as a Protecting Power (PP) to monitor whether protected persons are receiving humane treatment as required by the Geneva Conventions. The text of the Geneva Conventions, its annexes, and any special agreements, will be posted in each camp in the language of the EPW, CI and RP.

f. Medical Personnel. Retained medical personnel shall receive as a minimum the benefits and protection given to EPW and shall also be granted all facilities necessary to provide for the medical care of EPW. They shall continue to exercise their medical functions for the benefit of EPW, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the United States Armed Forces. They shall be provided with necessary transport and allowed to periodically visit EPW situated in working detachments or in hospitals outside the EPW camp. Although subject to the internal discipline of the camp in which they are retained such personnel may not be compelled to carry out any work other than that concerned with their medical duties. The senior medical officer shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel.

g. Religion.

(1) EPW, and RP will enjoy latitude in the exercise of their religious practices, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities. Adequate space will be provided where religious services may be held.

(2) Military chaplains who fall into the hands of the U.S. and who remain or are retained to assist EPW, and RP, will be allowed to minister to EPW, RP, of the same religion. Chaplains will be allocated among various camps and labor detachments containing EPW, RP, belonging to the same forces, speaking the same language, or practicing the same religion. They will enjoy the necessary facilities, including the means of transport provided in the Geneva Convention, for visiting the EPW, RP, outside their camp. They will be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Chaplains shall not be compelled to carry out any work other than their religious duties.

(3) Enemy Prisoners of War, who are ministers of religion, without having officiated as chaplains to their own forces, will be at liberty, whatever their denomination, to minister freely to the members of their faith in U.S. custody. For this purpose, they will receive the same treatment as the chaplains retained by the United States. They are not to be obligated to do any additional work.

(4) If EPW, RP, do not have the assistance of a chaplain or a minister of their faith. A minister belonging to the prisoner's denomination, or in a minister's absence, a qualified layman, will be appointed, at the request of the prisoners, to fill this office. This appointment, subject to approval of the camp commander, will take place with agreement from the religious community of prisoners concerned and, wherever necessary, with approval of the local religious authorities of the same faith. The appointed person will comply with all regulations established by the United States.

1–6. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

c. A competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade. The senior officer shall serve as President of the Tribunal. Another non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.

d. The convening authority shall be a commander exercising general courts-martial convening authority.

e. Procedures.

(1) Members of the Tribunal and the recorder shall be sworn. The recorder shall be sworn first by the President of the Tribunal. The recorder will then administer the oath to all voting members of the Tribunal to include the President.

(2) A written record shall be made of proceedings.

(3) Proceedings shall be open except for deliberation and voting by the members and testimony or other matters which would compromise security if held in the open.

(4) Persons whose status is to be determined shall be advised of their rights at the beginning of their hearings.

(5) Persons whose status is to be determined shall be allowed to attend all open sessions and will be provided with an interpreter if necessary.

(6) Persons whose status is to be determined shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. Witnesses shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered as evidence.

(7) Persons whose status is to be determined have a right to testify or otherwise address the Tribunal.

(8) Persons whose status is to be determined may not be compelled to testify before the Tribunal.

(9) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination.

(10) A written report of the tribunal decision is completed in each case. Possible board determinations are:

(a) EPW.

(b) Recommended RP, entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP.

(c) Innocent civilian who should be immediately returned to his home or released.

(d) Civilian internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained.

f. The recorder shall prepare the record of the Tribunal within three work days of the announcement of the tribunal's decision. The record will then be forwarded to the first Staff Judge Advocate in the internment facility's chain of command.

g. Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise punished without further proceedings to determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying EPW status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

1–7. The National Prisoner of War Information Center (NPWIC)

The NPWIC will—

a. Forward blocks of ISNs to designated Branch PWIC in Theater and CONUS, as required.

b. Obtain and store information concerning EPW, CI and RP, and their confiscated personal property. Information will be collected and stored on each EPW, CI, and RP captured and detained by U.S. Armed Forces. This includes those EPW, RP, who were captured by the United States but are in custody of other powers and those who have been released or repatriated. EPW, CI and RP cannot be forced to reveal any information however they are required to provide their name, rank, serial number and date of birth. The Geneva Convention requires the NPWIC to collect and store the following information for EPW, RP:

(1) Complete name.
(2) ISN.
(3) Rank.
(4) Serial number.
(5) Date of birth.
(6) City of birth.
(7) Country of birth.
(8) Name and address of next of kin.
(9) Date of capture.
(10) Place of capture.
(11) Capturing unit.
(12) Circumstances of capture.
(13) Location of confiscated personal property.
(14) Nationality.
(15) General statement of health.
(16) Nation in whose armed services the individual is serving.
(17) Name and address of a person to be notified of the individual's capture.
(18) Address to which correspondence may be sent.
(19) Certificates of death or duly authenticated lists of the dead.
(20) Information showing the exact location of war graves together with particulars of the dead.
(21) Notification of capture.
(22) List of personal articles of value not restored upon repatriation.

c. Obtain and store information concerning CI and ODs who are kept in the custody of U.S. Armed Forces who are subjected to assigned residence, or who were interned and then released. The following information will be collected:

(1) Any particulars that may assist in the individual's identification. This information shall include at least the person's surname, first names, place and date of birth, nationality, last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the actions taken with regard to the individual, the address at which correspondence may be sent and the name and address of the person to be informed.

(2) The individual's personal data for notification of his or her internment, state of health, and changes to this data.

(3) Certificates of death or authenticated lists of the dead and information showing the location of graves.

(4) Authenticated lists of personal valuables left by these protected persons.

(5) Information pertaining to children living in territories occupied by the United States. This will include all data necessary for identifying children whose identity is in doubt.

d. Process all inquiries concerning EPW and RP captured by U.S. Armed Forces.

e. Make reports to the ICRC, the State Department, and other Federal agencies as required.

f. Provide to the adverse party via the ICRC's Central Tracing Agency (CTA) all pertinent information pertaining to EPW, CI, and RP, in custody of the U.S. Armed Forces.

g. Transmit via the CTA/ICRC/PP, all official documents and information on judicial proceedings concerning EPW and RP captured, interned, retained or detained by U.S. Armed Forces.

h. Information and Property Transfers.

(1) In response to an inquiry, the NPWIC will forward all information and documents to the CTA or PP.

(2) Valuables and personal property which can be returned to a released or repatriated person will be forwarded through the CTA or PP.

(3) Valuables and personal property of deceased EPW/RP, which can be released, will be forwarded to the next of kin through the CTA or PP.

i. The ICRC/PP transmits information, documents, and personal effects to the State it represents as follows:

(1) If civilians are concerned, to their countries of origin and/or residence.

(2) If combatants or EPW, CI, and RP are concerned, to their country of origin or to the Power on which they depend.

1–8. The Branch PWIC

a. The Branch PWIC functions as the field operations agency for the NPWIC. It is the central agency responsible to maintain information on all EPW, CI and RP and their personal property within its assigned theater of operations or in CONUS.

b. The Branch PWIC serves as the theater repository for information pertaining to:

(1) Accountability of EPW, CI, and RP and implementation of DOD policy.

00000096

00000097

(2) Providing initial and replacement block ISN assignments to theater EPW, CI and RP processing organizations, and requests replacement ISNs from the NPWIC.

(3) Obtaining and storing information concerning all EPW, CI and RP, in the custody of U.S. Armed Forces, those captured by U.S. Armed Forces and transferred to other powers for internment (either temporarily or permanently), those EPW and RP transferred to CONUS for internment, and EPW, CI and RP released or repatriated. Obtaining and storing information about CI kept in the custody of U.S. Armed Forces within its assigned theater of operations who are subjected to assigned residence, interned, or released. Information required includes:

(a) That which may assist in an individual's identification.

(b) Certificates of death or authenticated lists of the dead.

(c) Information showing the location of war graves, together with particulars of the dead.

(d) Individual personal data, notification of capture, state of health, and changes.

(e) Certificates of death or authenticated lists of the dead and information showing the location of graves.

(f) Authenticated lists of personal valuables left by CI.

(g) Information pertaining to children living in territories occupied by the United States. This will include all data necessary for identifying children whose identity is in doubt.

(4) Processing, storing and maintaining all personal property of escaped or dead EPW/CI/RP or articles of value which were not restored upon repatriation, until final disposition instructions are received from the NPWIC or next higher headquarters.

(5) Processing and replying to all inquiries received from the NPWIC, the chain of command, or other agencies as directed by the NPWIC concerning EPW/CI/RP and other protected persons in the theater of operations that the U.S. is responsible for under the Geneva Conventions.

(6) Making regular reports to the NPWIC, the chain of command, and supported internment facilities as required. This will include all pertinent information, official documents and information on judicial proceedings pertaining to EPW/CI/RP in the theater of operations for which the U.S. is responsible under the Geneva Conventions.

(7) Valuables and personal property which can be returned to a released or repatriated person are forwarded to the ICRC CTA or Protecting Power, as directed by the NPWIC.

(8) Valuables and personal property of deceased EPW, CI, and RP which can be released, will be forwarded to the next of kin through the NPWIC to the ICRC Central Tracing Agency or Protecting Power.

(9) Confiscated property which cannot be released or returned will be stored until final disposition is determined.

(a) Unclaimed property will be safeguarded by the Branch PWIC until all EPW/CI have been repatriated. If property ownership cannot be determined, said property shall be released through the MP BDE G-4 and SUPCOM to the Defense Reutilization and Marketing Office (DRMO).

(b) Unclaimed money and negotiable instruments will be maintained by the PWIC pending inquiry. Upon completion of all repatriation actions and inquiries, unclaimed money and negotiable instruments will be transferred to the FAC as abandoned property.

(10) Accountability data concerning personal and confiscated property of EPW, CI, and RP transferred to CONUS will be forwarded directly to the PWIC designated to support CONUS operations.

(11) The Branch PWIC is responsible for establishing and enforcing the information requirements that the United States forces will collect on EPW,CI and RP taken or held in the Branch PWIC's area of responsibility. The Branch PWIC will receive its information requirements from the NPWIC.

1-9. Public Affairs

In the interest of national security, and the protection of the prisoners from public curiosity, and in adherence to the GPW and GC, EPW, CI, RP and other detainees will not be photographed as per paragraph 1-5d. Interviews of EPW, CI, RP and other detainees by news media will not be permitted. Requests for media access to EPW, CI, or other detainee internment facilities will be coordinated through the Public Affairs Office, and the Staff Judge Advocate, and approved by the first commander who exercises General Court Martial Convening Authority over the internment facility. Requests for exception to policy will be forwarded through command channels to HQDA (SAPA-PP), Washington, D.C. 20310-0420.

Chapter 2
Beginning of Captivity EPW/RP

2-1. Initial actions upon capture

a. The commanding officer of the capturing unit will ensure that:

(1) All EPW/RP are protected, safeguarded, and accounted for per this regulation. This regulation applies from the time of capture until evacuation to designated internment facilities.

(a) Each EPW/RP will be searched immediately after capture. Use males to search males and females to search female prisoners, when possible. Weapons, ammunition, and equipment or documents with intelligence value will be confiscated and turned over to the nearest intelligence unit. Propaganda and other Psychological Operations (PSYOP) materials will be confiscated, identified by the EPW/RP name and ISN and turned over to the supporting EPW/CI PSYOP unit through intelligence channels. Currency will only be confiscated on the order of a commissioned officer and will be receipted for using DA Form 4137 (Evidence/Property Custody Document). EPW and RP are allowed to retain personal effects such as jewelry, helmets, canteens, protective mask and chemical protective garments, clothing, identification cards and tags, badges of rank and nationality, and Red Cross brassards, articles having personal or sentimental or religious value, and items used for eating except knives and forks.

(b) All prisoners of war and retained persons will, at the time of capture, be tagged using DD Form 2745. They will be searched for concealed weapons and items of intelligence. All equipment, documents, and personal property confiscated during the search must be tagged and administratively accounted for by the capturing unit. Capturing units must provide the: date of capture, location of capture (grid coordinates), capturing unit, and any special circumstances of the capture (how the EPW was captured). The remaining information will be included on the tag as it becomes available.

(c) The DD Form 2745 is performed in three parts. The form is individually numbered and is constructed of durable, waterproof, tear-resistant material, and has reinforced eye-holes at the top of parts A and C. Part A is attached to the detainee with wire, string, or other type of durable material. Part B is retained by the capturing unit and maintained in the unit's records. Part C is attached to the property confiscated from the detainee, so that it may later be matched to that detainee.

(d) Prisoners may be interrogated in the combat zone. The use of physical or mental torture or any coercion to compel prisoners to provide information is prohibited. Prisoners may voluntarily cooperate with PSYOP personnel in the development, evaluation, or dissemination of PSYOP messages or products. Prisoners may not be threatened, insulted, or exposed to unpleasant or disparate treatment of any kind because of their refusal to answer questions. Interrogations will normally be performed by intelligence or counterintelligence personnel.

(e) Prisoners will be humanely evacuated from the combat zone and into appropriate channels as quickly as possible. Instructions given to prisoners during evacuation from the combat zone will be, if possible, in their own language and as brief as possible. When military necessity requires delay in evacuation beyond a reasonable period of time, health and comfort items will be issued, such as food, potable water, appropriate clothing, shelter, and medical attention. Prisoners will not be unnecessarily exposed to danger while awaiting evacuation. The capturing unit may keep prisoners in the combat zone in cases where, due to wounds or sickness, prompt evacuation would be more dangerous to their survival than retention in the combat zone. Individuals presumed to have intelligence value should be separated immediately from other EPW.

(f) Accountability will be maintained for all evacuated prisoners, regardless of the evacuation channel used. Units designated to receive the prisoners at the collecting points or camps will prepare a receipt DD Form 629 (Receipt for Prisoner or Detained Person) with a list of each prisoner's name attached and provide a copy of the receipt to the escort.

(g) Prisoners will not be located next to obvious targets such as ammunition sites, fuel facilities, or communications equipment. First aid and medical treatment will be provided to the same extent that the United States provides to its own forces. Sick and wounded prisoners will be evacuated separately, but in the same manner as U.S. and allied forces. Accountability and security of prisoners and their possessions in medical facilities is the responsibility of the respective echelon commander.

b. Special policy pertaining to the temporary detention of EPW, CI, RP and other detained persons aboard United States naval vessels:

(1) Detention of EPW/RP on board naval vessels will be limited.

(2) EPW recovered at sea may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility, or to another vessel for transfer to a shore facility.

(3) EPW/RP may be temporarily held aboard naval vessels while being transported between land facilities. They may also be treated and temporarily quartered aboard naval vessels incidental to their treatment, to receive necessary and appropriate medical attention if such detention would appreciably improve their health or safety prospects.

(4) Holding of EPW/RP on vessels must be temporary, limited to the minimum period necessary to evacuate them from the combat zone or to avoid significant harm that would be faced if detained on land.

(5) Use of immobilized vessels for temporary holding of EPW/RP is not authorized without SECDEF approval.

2-2. Evacuation and care of EPW and RP

Those units designated to hold and evacuate EPW and RP will:

a. Collect prisoners from capturing units, and evacuate them from the combat zone as soon as possible.

b. Ensure sick and wounded EPW and RP in their custody are classified, by qualified medical personnel, as either walking wounded or litter, or as non-walking wounded. Walking wounded or litter EPW will be evacuated through established evacuation channels. Non-walking wounded or sick EPW will be delivered to the nearest medical aid station and evacuated through medical channels. All detained personnel will remain physically segregated from U.S. and allied patients.

(1) Appropriate intelligence sources will be notified when EPW and RP are found in possession of large sums of U.S. or foreign currency. A receipt DA Form 4137 will be prepared to account for all property that is taken from the EPW. Copies of DD Form 629 (Receipt for Prisoner or Detained Person) and DA Form 4137 will be maintained to establish positive accountability of the EPW and their property and can be used to substantiate proper care and treatment at a later time. DA Form 4137 will be used to account for property released before final disposition is ordered. Records of disposition of property will be evacuated with prisoners for inclusion in their personnel records.

(2) EPW will be segregated into categories of officer, noncommissioned officer, enlisted, male, female, seniority, recognized ethnic groups, deserters or any other category that the senior officer or NCO having custody of the prisoners designate to ensure the security, health and welfare of the prisoners. Segregation should prevent prisoners from communicating by voice or visual means. Guards will communicate with the prisoners only to give commands and instructions.

(3) The requirements for safeguarding prisoners are the same as those for captured units.

c. In cases of mass capture or surrender of entire units, combat units should be examined and those with the greatest intelligence value identified for debriefing.

d. Repatriation or parole of the remainder should be considered, with final determination directed by HQDA. Prisoners will not be forced to be repatriated against their will. Prisoners who refuse repatriation will be treated as prisoners of war until their legal status and further disposition can be determined by competent authority.

2-3. Evacuation Policy

a. Evacuation of EPW or RP outside the theater of operations requires SECDEF approval.

b. Wounded EPW generally will not be evacuated to CONUS until released from medical channels. They will be processed through U.S. military police assets. If EPW are to be medically evacuated, they will be processed and accounted for per this regulation.

Chapter 3
Administration and Operation of EPW Internment Facilities

3-1. Establishment

Internment facilities will be established in the communications zone of each theater of operations for the purpose of receiving, accounting for, administering, securing, and logistically supporting EPW/RP.

3-2. EPW internment facilities

a. The operation of all EPW internment facilities is governed by the provisions of the Geneva Conventions.

b. The theater commander remains responsible for the humane treatment of EPW facilities. EPW/RP may be interned only in premises located on land and affording proper health and hygiene standards. Except in extreme circumstances, or in the best interests of the individual, EPW/RP will not be interned in correctional facilities housing military or civilian prisoners. Prisoners will not normally be interned in unhealthy areas, or where the climate proves to be injurious to them, and will be removed as soon as possible to a more favorable climate. Transit camps or collecting points will operate under conditions similar to those prescribed for permanent prisoner of war camps, and the prisoners will receive the same treatment as in permanent EPW camps.

c. The internment facility will be marked with the letters "PW" (Prisoner of War Camps) and will be placed so they will be clearly visible from the air during the daytime. Other markings may be used when agreed to by the combatant commanders and approved by HQDA.

3-3. EPW Facility Management

a. The United States may subject EPW/RP to internment and may have contingency plans to confine and enclose EPW in camps located both in and outside CONUS. Medical personnel and chaplains classified as RP, while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered prisoners of war. The EPW facility commander will provide command, control, accountability, administrative, and logistical support for the operation of all EPW/CI facilities. The EPW/CI facility commander will:

(1) Intern prisoners captured by or transferred to the custody of U.S. forces.

(2) Process interned prisoners to include tagging, assignment of ISN, fingerprinting, photographing, and weighing, as needed.

(a) EPW and RP may be required to show their identity card issued by his or her government; however in no case may the card be taken from the individual.

(b) If an EPW does not hold an identity card issued by his or her

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government, the EPW will be issued a completed DA Form 2662-R (EPW Identity Card). The identity card will be in the possession of the EPW at all times. A notation indicating preparation of DA Form 2662-R will be made under item 36 of DA Form 4237-R (Detainee Personnel Record). DA Form 2662-R will be reproduced locally on 3-by 3-inch card head to foot. A copy for reproduction purposes is located at the back of this regulation. DA Form 4237-R will be reproduced locally on 8 1/2 by 11-inch paper. A copy for reproduction purposes is located at the back of this regulation. These forms are for the use of Army only.

(c) DA Form 2663-R (Fingerprint Card) will be prepared in duplicate for each EPW/RP. One copy will be retained in the camp in which the EPW/RP is confined and will accompany the EPW/RP upon transfer. The other is forwarded to the Branch PWIC.

(3) Provide prisoners with humane treatment, health and welfare items, quarters, food, clothing, and medical care. Health Services Command (HSC) provides medical and dental care for EPW in federal or civilian health care facilities per HSC plans.

(4) Provide for morale, religious, intellectual, educational, social, physical and recreational activities for the prisoners.

(5) Establish liaison with the supporting Branch PWIC, collect necessary information regarding the location, the personal well-being, legal status, and any change thereto, of all prisoners retained by the command.

(6) Allow prisoners to correspond with their families and receive relief shipments.

(7) Provide prisoners copies of the 1949 Geneva Conventions (in their own language, if possible).

(8) Employ and compensate assigned prisoners based on verified needs/requirements and monitor all aspects of EPW and RP employment per this regulation. If sundry packets are provided, no advance pay is required.

(9) Provide command and control, and operate, administer, and secure the camp.

(10) Prepare necessary documents for administrative actions, court-martial charges or any disciplinary proceedings for prisoners.

(11) Post personnel files and maintain unit level records of proceedings.

(12) Supervise qualified EPW/RP in providing medical care and field sanitation/preventive medicine for prisoners.

(13) Provide the initial medical examination and monthly screening of prisoners.

(14) Maintain EPW labor and finance records on each prisoner per AR 37-1.

(15) Ensure preparation of monthly pay credit statements of prisoner's personal accounts and ensure pay for prisoners.

(16) Direct activities relating to the assignment and supervision of work projects for prisoners.

(17) Advise employers of provisions for handling EPW.

(18) Establish and maintain records of prisoner labor projects.

(19) Provide initial reports of and perform initial investigations and inquiries into prisoner labor injuries or incidents.

(20) Report allegations of criminal acts or war crimes committed by or against EPW/RP to the supporting element of the U.S. Army Criminal Investigation Command (USACIDC). Deaths resulting from other than natural causes will be investigated by USACIDC.

(21) Provide assistance to the medical facility commander to assess the threat posed by hospitalized EPW.

(22) Establish and maintain complete and accurate accountability information regarding the location, physical and legal status, training, and employment of all individuals in the custody of, or assigned to, the EPW facility. Information will be posted to the individual's personal, medical, and financial records, and will be provided to the supporting PWIC and next higher headquarters, as required.

(23) Provide an area for intelligence collection efforts.

g. USACIDC will ensure criminal investigative support for EPW and RP is planned and resources are allocated for this purpose.

3–4. Operation of prisoner of war internment facilities

EPW camps will be organized and operated, when possible, as other military commands. Each internment facility will be commanded by a commissioned officer of the U.S. Military. The following provisions will be observed.

a. The Geneva Conventions will be posted within the camp in the language(s) of the EPW/RP nation(s). A copy of the text will be supplied, on request, to any person who does not have access to posted copies. The supporting EPW/CI PSYOP unit can assist in preparing and disseminating native language copies of the text as well as other translation, printing, and audio-visual information dissemination support.

b. EPW will be interned in camps according to their nationality and language. They will not be separated from other prisoners belonging to the Armed Forces with which they were serving at the time of their capture, except with their consent. Officers will be separated from enlisted personnel and females will be separated from males.

c. EPW representatives will be authorized for EPW Camps.

(1) At each enlisted EPW or branch camp, EPW will select a prisoner representative. These representatives will be elected by secret ballot every 6 months and are eligible for reelection. EPW will be permitted to consult freely with their representatives. In turn, their representatives will represent them before:

(a) The military authorities.

(b) The Protecting Power.

(c) The ICRC.

(d) Other relief or aid organizations.

(2) In officer EPW camps or in camps with both officers and enlisted EPW, the senior EPW officer, unless incapacitated or incompetent, will be recognized as the prisoner representative. In officer EPW camps, one or more advisors chosen by the EPW officers will assist the prisoner representative. The supporting EPW/CI PSYOP unit can assist in identifying officers, key communicators, and English speaking EPW who may be hiding within the camp population.

(3) In mixed camps (officers and enlisted), one or more enlisted advisors will be elected to assist the EPW officer representative.

(4) The camp commander will be designated as the final approval authority for each elected prisoner representative. When the camp commander denies, approves, or dismisses an elected representative, a notice to that effect will be sent through channels to HQDA, (DAMO-ODL) NPWIC for forwarding to the ICRC or the PP. Reasons for the refusal will be included. EPW will then be permitted to elect another representative.

(5) RP (medical personnel and chaplains) are not considered prisoners of war and therefore may not elect prisoner representatives. The senior medical officer in each camp will be responsible for matters connected with the activities of retained medical personnel. Individual chaplains, like the responsible medical officer, will have direct access to camp authorities.

(6) Prisoner representatives may appoint EPW assistants. These assistants are in addition to the advisors provided for in (2) above. The camp commander will also approve the selection of such assistants and their continuance in those positions.

(7) Prisoner representatives must be of the same nationality, observe the same customs, and speak the same language as the EPW they represent. EPW interned in separate compounds due to differing nationality, language, or customs will be permitted to have their own prisoner representative according to (1) through (4) above. The internment facility commander will establish the local policy for an escort to accompany the representatives.

(8) Duties, responsibilities, and available resources.

(a) Representatives will be responsible for furthering the physical, spiritual, and intellectual well-being of the persons they represent. They will not exercise any disciplinary powers. They will not perform any other work if the work interferes with their duties as representatives. They will be allowed a reasonable time to acquaint their successors with their duties and related current affairs.

(b) Representatives may be given the freedom of movement needed to accomplish their duties, such as inspection of labor detachments and receipt of supplies. Ordinarily, representatives will be permitted to visit places where EPW, whose interests they represent, are detained.

(c) Postal and telegraph facilities will be made available to prisoner representatives for communicating with the U.S. Army authorities; Protecting Powers, if any; the ICRC and its delegates; the Mixed Medical Commission, and other organizations authorized to assist EPW. Prisoner representatives of branch camps will be granted the same facilities for communication with the prisoner representative of the parent camp.

d. EPW/RP social privileges. Social privileges will be subject to security considerations and camp discipline. EPW/RP will be encouraged to take part in intellectual, educational, and recreational activities. The introduction of political overtones into or the furtherance of anti-U.S. propaganda objectives through these activities is prohibited. The supporting EPW/CI PSYOP unit can assist in identifying agitators, malcontents, and political officers who may create resistance within the camp. These units are also trained to develop and implement programs to reduce hostile political activity and to persuade EPW/CI populations to accept U.S. authority and regulations.

e. EPW/RP will be quartered under conditions as favorable as those for the force of the detaining power billeted in the same area. The conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health. The foregoing shall apply in particular to the dormitories of EPW/RP as it regards both total surface and minimum cubic space and the general installation of bedding and blankets. Quarters furnished to EPW/RP must be protected from dampness, must be adequately lit and heated (particularly between dusk and lights-out), and must have adequate precautions taken against the dangers of fire. In camps accommodating both sexes, EPW/RP will be provided with separate facilities for women. When possible consult the preventive medicine authority in theater for provisions of minimum living space and sanitary facilities.

f. The daily food rations will be sufficient in quantity, quality, and variety to keep EPW/RP in good health and prevent loss of weight or development of nutritional deficiencies.

(1) Account will be taken of the habitual diet of the prisoners.

(2) EPW/RP who work may be given additional rations when required.

(3) Sufficient drinking water will be supplied to EPW/RP.

(4) The use of tobacco will be permitted in designated smoking areas.

(5) EPW will, as far as possible, be associated with the preparation of their meals and may be employed for that purpose in the kitchens. Furthermore, they will be given means of preparing additional food in their possession. Food service handlers must have training in sanitary methods of food service.

(6) Adequate premises will be provided for messing.

(7) Collective disciplinary measures affecting food are prohibited.

g. Clothing, underwear, and footwear will be supplied to EPW/RP in sufficient quantities, and allowances will be made for the climate of the region where the prisoners are detained. Captured uniforms of enemy armed forces will, if suitable for the climate, be made available to clothe EPW/RP. The camp commander will ensure the regular replacement and repair of the above articles. EPW/RP who work will receive clothing appropriate to the nature or location of the work demands.

h. Canteens. EPW/RP will be provided sundry/health and comfort packs, which may be supplemented with items tailored to their cultural needs, as a temporary substitute for establishing canteen operations. When directed by the Theater Army Provost Marshal or senior Military Police officer in the internment facilities' chain of command, canteens will be installed in all camps, where EPW/RP may procure foodstuffs, soap, tobacco and ordinary articles in daily use. The tariff will never exceed local market prices. When authorized, canteens will be operated IAW the provisions of the GPW. Procedures regarding EPW/RP payment for canteen purchases are contained in AR 37-1. Profits made by canteen canteens will be used for the benefit of the prisoners, a special fund will be created for this purpose. The prisoners' representative may make suggestions regarding the management of the canteen and of this fund. When an internment facility is closed, the credit balance of the special fund will be transferred to another U.S. internment facility operating in theater. When all facilities are closed, funds will be turned over to an international welfare organization. The fund will be employed for the benefit of EPW/RP of the same nationalities as those who have contributed to the fund. In case of a general repatriation, profits will be kept by the United States.

i. Hygiene and medical care.

(1) The United States is bound to take all sanitary measures necessary to ensure clean and healthy camps to prevent epidemics. EPW/RP will have access, day and night, to latrines that conform to the rules of hygiene and are maintained in a constant state of cleanliness. In camps in which women EPW/RP are accommodated, separate latrines will be provided for them. EPW/RP will have sufficient water and soap for their personal needs and laundry. The necessary facilities and time will be made available for these purposes. The supporting EPW/CI PSYOP unit can assist in maintaining and improving health and sanitary conditions by producing and disseminating informational products concerning proper hygiene, sanitation, and food preparation, where required.

(2) Every camp will have an infirmary. EPW/RP with a contagious disease, mental condition, or other illness, as determined by the medical officer, will be isolated from other persons. A list of endemic diseases of military importance can be obtained from the theater surgeon or preventive medicine officer. EPW/RP will be immunized and reimmunized against other diseases as recommended by the Theater Surgeon. EPW/RP suffering from serious disease, or whose condition necessitates special treatment, surgery, or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given. Special facilities will be available for the care and rehabilitation of the disabled, particularly the blind. EPW/RP will be accorded the attention of medical personnel of the power on which they depend and, if possible, of their nationality. EPW/RP will not be denied medical care. The detaining authorities shall, upon request, issue to every EPW/RP who has undergone treatment, an official certificate indicating the nature of the illness or injury, and the duration and kind of treatment received. A duplicate of this certificate will be forwarded to the ICRC. The detaining authority will also ensure medical personnel properly complete the SF 88 (Report of Medical Examination), SF 600 (Chronological Record of Medical Care and DA Form 3444 (Treatment Record). The cost of treatment will be borne by the United States.

(3) Medical inspections of EPW/RP will be held at least once a month, where each detainee will be weighed and the weight recorded on DA Form 2664-R (Weight Register). DA Form 2664-R will be reproduced locally on 8- by 5-inch card. A copy for reproduction purposes is located at the back of this regulation. This form is for the use of Army only. The purpose of these inspections will be to monitor the general state of health, nutrition, and cleanliness of prisoners and to detect contagious diseases, especially tuberculosis, venereal disease, lice, louse-borne diseases and HIV.

(4) EPW who, though not attached to the medical service of the Armed Forces, are physicians, surgeons, dentists, nurses, or medical orderlies may be required to exercise their medical functions in the interests of prisoners of war dependent on the same power after being certified per Paragraph 3-15. They will continue to be classified as EPW but will receive the same treatment as corresponding RP (medical personnel). They will be exempted from any other work.

(5) Experimental research will not be conducted on EPW/RP.

3–5. Procedures for prisoner of war correspondence

a. EPW/RP will be allowed to send and receive letters and cards. There is no restriction on the number or length of letters or cards EPW/RP may receive. EPW/RP will be permitted to send not less than two letters and four cards monthly, in addition to the captors

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cards provided in Article 70, GPW. In the event EPW/RP are prevented from writing their monthly quota of letters and cards because of a lack of stationery forms, they will be allowed to make up their quotas when forms are available.

b. All persons may address complaints, in writing to U.S. military authorities and the Protecting Power. These communications will not be limited in length or number, nor will they be charged against the person's correspondence quota. They will be transmitted without delay.

c. Letters and cards addressed to persons other than representatives of a Protecting Power or to U.S. military authorities will not:

(1) Contain complaints or criticism of any governmental agency or official.

(2) Refer to events of capture.

(3) Compare camps.

(4) Contain quotations from books or other writings.

(5) Contain numbers, ciphers, codes, music symbols, shorthand, marks, or signs other than those used for normal punctuation.

(6) Contain military information on members of EPW/RP. (Exception: Letters to a Protecting Power or prisoner representative or to a relief or aid organization.)

(7) Should any such correspondence be discovered, it will be turned over to the supporting counterintelligence element.

d. Correspondence forms.

(1) EPW will use DA Form 2667-R (Prisoner of War Mail (Letter)) and DA Form 2668-R (Prisoner of War (Post Card)) for correspondence, except as authorized elsewhere in this regulation. DA Form 2667-R will be reproduced on 8 1/2-by 11-inch paper, head to head. DA Form 2668-R will be reproduced locally on 6-by 4-inch cards, head to foot. Copies for reproduction purposes are located at the back of this regulation. These forms are for the use of Army only. Legal documents may be written on blank paper instead of DA forms. Prisoner representatives may use ordinary paper in writing to:

(a) The Protecting Power.

(b) ICRC.

(c) Other approved relief or aid organizations.

(d) U.S. military authorities.

(2) Except for official correspondence by prisoner representatives or unless required by HQDA, communication in two or more copies is prohibited.

(3) Camp commanders will distribute DA letter and card forms to EPW/RP.

(4) Upon Completion of DA Form 4237-R, but not later than 1 week after arrival at a camp for processing, each EPW or RP will be permitted to send a DA Form 2666-R to a relative or next of kin.

(5) Within a period of not more than 1 week after arrival at the first EPW camp or when an EPW/RP's address is changed by transfer to a hospital or to another camp, a DA Form 2665-R (Capture Card for Prisoner of War) will be filled out and forwarded to the Branch PWIC. DA Form 2665-R will be reproduced locally on 6-by 4-inch card, head to foot, a copy for reproduction purposes is located at the back of this regulation. This form is for the use of Army only.

e. Subject to (1) and (2) below, outgoing letters and cards will be sent unsealed directly from the camp to the theater commander's designated censorship element. All incoming letters and cards that arrive at a camp without having been censored will be sent to the designated censorship element before delivery to addressees.

(1) Communication to the Protecting Power or the ICRC. Letters and cards not intended for other addressees and not containing enclosure for other addressees will be forwarded directly from the camp to the proper Branch PWIC.

(2) Other correspondence. Outgoing letters and cards from a branch camp's EPW will be forwarded as soon as possible.

f. Date and packaging of correspondence. Letters and cards will be forwarded without undue delay in pouches or in government envelopes.

(1) EPW/RP may not write letters for others who are able to write. If an EPW/RP is unable to write, the camp commander may permit another person to write the message. The person doing the writing will countersign the message.

(2) EPW/RP legal documents may be enclosed with outgoing correspondence. When it becomes necessary for a detainee to send a legal document, the document and forwarding letter or card may be enclosed in a plain envelope.

(3) EPW/RP will not send maps, sketches, or drawings in outgoing correspondence.

g. Individuals will not be permitted to mail or receive registered, certified, insured, or COD.

h. Letters and cards to or from EPW/RP sent by ordinary mail are postage free.

i. Outgoing letters and cards will be secured by using locked boxes or similar means. Only authorized U.S. personnel will handle outgoing mail. Incoming mail may be sorted by detainees when supervised by U.S. personnel.

j. Censorship of EPW/RP mail may be instituted by the theater commander as follows:

(1) Outgoing letters and cards may be examined and read by the camp commander or his designated representatives. No censorship action of any kind will be taken at the camp. The camp commander will return to the sender for rewriting any outgoing correspondence containing obvious deviations from regulations with a copy provided to the supporting counterintelligence element.

(2) Camp commanders will designate U.S. military personnel to supervise the opening of all mail pouches containing incoming letters and cards for detainees. These items will be carefully examined by the named personnel before delivery to detainees.

(3) EPW/CI wishing to make complaints concerning mail delivery must direct those complaints to:

(a) The camp authorities.

(b) The responsible major commander.

(c) The Protecting Power/ICRC.

k. Parcels.

(1) Persons may receive individual parcels and collective shipments containing:

(a) Foodstuffs.

(b) Clothing.

(c) Medical supplies.

(d) Articles of a religious, educational, or recreational nature.

(2) EPW/RP will not be permitted to mail parcels (Article 16, 1974 Universal Postal Convention).

(3) Parcels received for transferred persons will be forwarded immediately.

(4) Nonperishable articles received for persons who have died or escaped, or who have been repatriated, will be forwarded to the Branch PWIC. Perishable items received for deceased or escaped persons will be released to the prisoner representative who will deliver them to the camp infirmary or hospital for the benefit of EPW/RP.

(5) The contents of all incoming parcels will be examined at the camp by a U.S. officer in the presence of the addressee or the named representative. When considered necessary, the camp commander may request that the parcel be examined by the censors. The articles in each parcel will be removed. The string, the inner wrappings, the outer container, and any extraneous items found in the parcel will not be turned over to the EPW/RP or the designated representative. Examination will be close enough to reveal concealed articles and messages; however, undue destruction of contents of parcels will be avoided.

l. EPW/RP may send and receive telegrams as determined by the camp commander. They may not make or receive telephone calls.

(1) At a minimum:

(a) A detainee who has not received mail from next of kin for 3 months may send a telegram. One month from the date a previous telegram was sent, a detainee who has not received a written answer or other communication from the addressee may send another telegram.

(b) Detainees unable to receive mail from their next of kin or send mail to them by ordinary postal routes, or who are a great distance from their home, will be permitted to send one telegram a month.

(c) A person who is seriously ill, or who has received news of serious illness or death in the family, may be permitted to send a telegram. The camp commander may authorize the sending of additional telegrams.

(2) The sending of telegrams as provided for in (1) above will be governed by the following:

(a) The message proper will consist of not more than 15 words.

(b) The cost of sending the telegram will be debited to the person's account.

(c) Arrangements for messages going to or through enemy-occupied countries will be made with the ICRC Field Director.

(d) Telegrams, as a general rule, shall be written in their native language.

(e) No telegram will be sent to a Government official or to a Protecting Power.

(f) Telegrams are subject to the same procedures for censorship listed in paragraph 3-5*j*(2).

m. EPW/RP may receive books. Books that arrive at camps uncensored will be censored. Publications containing maps may be made available to the EPW/RP upon approval of the camp commander, provided they do not contain maps of the territory surrounding the camps. Books, included in parcels of clothing and foodstuffs, may be confiscated on order of the camp commander.

n. The following may be made available to EPW/RP:

(1) Current newspapers and magazines published in the English language and selected by the camp commander.

(2) Unmarked, unused magazines in the English language, published in the United States, and distributed by approved relief or aid organizations at the discretion of the camp commanders after censorship.

(3) Foreign language newspapers and magazines published in the United States, upon approval of the camp commander and after censorship of individual issues.

(4) Newspapers and magazines published outside the United States, regardless of language, must be approved by the theater commander.

3–6. Discipline and security

Measures needed to maintain discipline and security will be established in each camp and rigidly enforced. The camp commander will maintain records of disciplinary punishments. These records will be open to inspection by the Protecting Power.

a. The following acts will not be permitted:

(1) Fraternization between EPW, RP and U.S. military or civilian personnel. Fraternization is defined as improper or excessive communications or actions between U.S. Armed Forces personnel and EPW/RP.

(2) Donating or receiving gifts or engaging in any commercial activity between persons in U.S. custody and U.S. personnel.

(3) Setting up of courts by detainees. Disciplinary powers will not be delegated to or exercised by EPW/RP. Punishment will not be administered by EPW/RP.

b. The GPW, regulations, orders, the contents of any special agreements and notices on the conduct and activities of detainees will be published in a language the detainee understands. They will be posted in places within each camp where the detainees may read them and will be made available to persons who do not have access to posted copies. Additional copies will be given to the prisoner representatives. Every order and command will be addressed to detainees personally. The supporting EPW/CI PSYOP unit may assist in providing necessary printed, loudspeaker, or other audio-visual support in communicating directly to EPW/RP. To protect persons from acts of violence, bodily injury, and threats of reprisals at the hands of fellow detainees, a copy of the following notice in the detainees' language will be posted in every compound:

NOTICE

EPW/RP who fear that their lives are in danger or that they may suffer physical injury at the hands of other EPW/RP are encouraged to report the fact personally to any U.S. Armed Forces Police or the camp warden, consulting the EPW/CI representatives. From that time on, the camp commander will assure adequate protection to such EPW/RP by segregation, transfer, or other means. EPW/RP who neglect to follow instructions will be punished.

Signed (Commanding Officer)

c. The following military courtesies are required of EPW:

(1) When the U.S. national anthem is played or "To the Colors" or "Retreat" is sounded, EPW not in buildings will stand at attention and face toward the music or colors.

(2) Besides the courtesies required in their own armies toward their officers, enlisted EPW will salute all commissioned officers of the U.S. Armed Forces. Officer EPW will be required to salute only officers of a higher rank and the camp commander regardless of grade.

(3) EPW may salute in the way prescribed by regulations in force in their own armies.

(4) Other military courtesies will be rendered per AR 600-25 (Salutes, Honors, and Visits of Courtesy) and FM-22-5 (Drill and Ceremonies).

d. U.S. military personnel will extend the following courtesies toward EPW:

(1) U.S. military personnel will not be required to salute EPW or assume the position of attention when addressing them; however, U.S. officers will return the salutes of EPW.

(2) When addressing senior officer EPW on official business, U.S. military personnel will be courteous and extend the respect due them by grade and age.

e. Flags upon which an enemy political emblem or device appears will be seized. EPW/RP will not have any political emblems, insignia, flag, or picture of political leaders. Badges of grade and nationality, and decorations worn as part of the uniform are permitted. EPW/RP may have pictures of political leaders that appear in magazines, books, and newspapers if the pictures are not removed.

f. Security guidelines outlined below concern the custody and use of EPW/RP.

(1) *Guard over details.* EPW on work details will be guarded as required to provide security against escape. Selected EPW/RP may be employed without guards in areas where military personnel are on duty if:

(a) EPW/RP are under a U.S. work supervisor.

(b) Frequent counts of detainees and work inspections are made at irregular intervals.

(2) *Preventing escape.* The camp commander will ensure that each EPW/RP understands the meaning of the English word "halt". If EPW/RP attempt to escape, the guard will shout "halt" three times, thereafter the guard will use the least amount of force necessary to halt the EPW/RP. If there is no other effective means of preventing escape, deadly force may be used.

(a) In an attempted escape from a fenced enclosure, a prisoner will not be fired at unless he/she has cleared the outside fence and is making further effort to escape.

(b) EPW/RP attempting to escape outside a fenced enclosure will be fired on if they do not halt after the third command to halt.

(c) An EPW/RP will have succeeded in escaping when he or she has:

1. Joined the armed forces of the power on which he or she depends or those of an ally of that power.

2. Left the territory under U.S. control or control of U.S. allied powers.

3. Joined a ship flying the flag of the power on which he or she depends, or of an ally of that power, in U.S. territorial waters, and the ship is not under U.S. control.

(d) An EPW who has successfully escaped shall not be punished for the escape if subsequently recaptured.

3–7. Punitive Jurisdiction

a. EPW/RP are subject to punishment under the Uniform Code of Military Justice and other U.S. Laws, regulations and orders in force during the time of their detention.

b. Judicial proceedings against EPW and RP will be by courts-martial or by civil courts. When EPW are tried by courts-martial, pretrial, trial, and post-trial procedures will be according to the UCMJ and the U.S. Manual for Courts-Martial. An EPW will not be tried by a civil court for committing an offense unless a member of the U.S. Armed Forces would be so tried.

c. When possible, disciplinary rather than judicial measures will be taken for an offense. The disciplinary measures below are authorized:

(1) Suspend or eliminate privileges granted over and above the minimum privileges provided for in the GPW and GC.

(2) Confinement.

(3) A fine not to exceed one-half of the advance of pay (article 60 GPW) and working pay (article 62 GPW) that the detainee would otherwise receive during a period of not more than 30 days.

(4) Fatigue duties not exceeding 2 hours daily. This punishment will not be applied to officers.

d. EPW and RP rights. Before any disciplinary punishment is pronounced, EPW/RP will be given precise information regarding the offenses for which they are accused. They will be given a chance to explain their conduct and to defend themselves. They will be permitted to call witnesses and to have use of a qualified interpreter, if necessary and reasonably available. The board's decision will be announced to the person and to the person's representative.

e. The following are limitations on punishment:

(1) Collective punishment for individual acts, corporal punishment, imprisonment in premises without sunlight, and any form of torture or cruelty is forbidden.

(2) EPW may not be deprived of their grade or prevented from wearing insignia of grade and nationality.

(3) No EPW or RP will be handcuffed or tied, except to ensure safe custody or when prescribed by a responsible medical officer as needed to control a medical case requiring restraint.

(4) No EPW or RP may be punished more than once for the same act or sentenced to any penalties except those authorized herein.

(5) In no case will disciplinary punishments be inhumane, brutal, or dangerous to the person's health. The length of a single disciplinary punishment will not exceed 30 days. Confinement served while awaiting the hearing of a disciplinary offense or the award of disciplinary punishment will be deducted from punishment awarded. No more than 30 days punishment may be prescribed even if a person is answerable for several acts at the same time. This is true whether such acts are related or not. The period between pronouncing an award of disciplinary punishment and commencing punishment will not exceed 30 days.

(6) When EPW or RP are awarded a further disciplinary punishment, a period of at least 3 days will elapse between punishments if the length of one of the punishments is 10 days or more.

(7) EPW or RP being disciplined or judicially punished will not be subjected to more severe treatment than that authorized for the same offense by members of the U.S. Armed Forces of equal grade.

(8) EPW or RP sentenced by a courts-martial or awarded disciplinary punishment will not be treated differently from other detainees after their punishment.

f. Offenses and warranted punishments. EPW or RP who attempt to escape or escape the confines of the camp, but who do not succeed in their escape, will be liable only to disciplinary punishments for those escape acts. They will not be liable to judicial proceedings, even if they are repeat offenders. Escapes or attempts to escape, even if they are repeat offenses, will not be considered aggravating circumstances if detainees are tried by judicial proceedings for offenses committed during their escapes or attempts to escape. Offenses, such as those against public property, theft without intention of self-enrichment, drawing up or use of false papers, or wearing of civilian clothing, that are committed by detainees with the sole intent of making their escape easier and that do not entail any violence against life or limb will warrant disciplinary punishment only. Because of attempts to escape, EPW and RP may be subjected to close watch. The watch must not affect the state of their health. The EPW and RP warrant must be in camp. The watch must not deprive them of the safeguards granted by the Geneva Conventions. Persons who aid or abet an escape or an attempt to escape will be liable on this count for disciplinary punishment only.

g. Offenses against discipline. EPW and RP accused of an offense against disciplinary measures will not be confined pending a hearing, unless members of the U.S. Armed Forces would be confined if they were accused of a similar offense or unless camp order and discipline would be jeopardized. A period spent in confinement awaiting disposal of an offense against disciplinary measures will be reduced to an absolute minimum. It will not exceed 14 days.

h. Confinement. A pretrial investigation of an offense alleged to have been committed by a detainee will be conducted as soon as circumstances permit so that trial, if warranted, will take place as soon as possible. A detainee will not be confined while awaiting trial unless a member of the U.S. Armed Forces would be so confined if accused of a similar offense, or unless national security would be served. In no case will this confinement exceed 3 months. A period spent in confinement while awaiting trial will be deducted from a sentence of imprisonment. The period will be taken into account in fixing a penalty.

i. Retention of Geneva Convention benefits. Persons prosecuted for an act committed before capture will retain, even if convicted, the protection of the Geneva Conventions. EPW, RP undergoing confinement will:

(1) Continue to enjoy the benefits of the Geneva Conventions except when such benefits do not apply because detainees are confined.

(2) Be permitted to exercise their right to complain and to confer with visiting representatives of the Protecting Power.

(3) Not be deprived of the prerogatives attached to their grade.

(4) Be allowed to exercise and to stay in the open air at least 2 hours daily.

(5) Be given medical attention as prescribed in this regulation.

(6) Be permitted to read and write and to send and receive letters and cards. Parcels, however, may be withheld from them until the punishment is completed. Such parcels will be released to the safekeeping of the detainee representative. If perishable goods are contained in the parcels, the detainee representative will give them to the camp infirmary or hospital to distribute them fairly among the other detainees.

3–8. Judicial proceedings

a. No EPW or RP will be tried or sentenced for an act that was not forbidden by U.S. law or by international law in force at the time the act was committed.

b. No moral or physical coercion will be exerted to induce EPW or RP to admit guilt for any act.

c. No EPW or RP will be convicted without having had the chance to present a defense and without having the assistance of a qualified advocate or counsel.

d. Accused persons will be notified promptly of the charges in writing. Charges will be in a language understood by the accused. These persons will be tried as soon as possible. A notification (in duplicate) of proceedings against a detainee will be transmitted through channels to the NPWIC. The NPWIC will send such notification to the Protecting Power in cases of charges involving the death penalty or imprisonment for 2 years or more. Upon request, the Protecting Power will be furnished data on the status of such proceedings. Furthermore, the Protecting Power will be entitled, upon request, to be furnished with all data on any other proceedings carried against a detainee. The information will be sent without delay. Trial will not commence until 3 weeks after the Protecting Power has been notified. Unless evidence is submitted at the opening of the trial that this regulation has been fully complied with, the trial will not proceed. The following information will be provided:

(1) Surname and first name, grade, if proper, ISN, date of birth, and profession, trade, or prior civil capacity of the detainee.

(2) Place of internment or confinement.

(3) Specification of the charges with penal provisions under which they are brought.

(4) Designation of the court that will hear the case.

e. The EPW representatives will be informed of all judicial proceedings against EPW and RP and the results of the proceedings. Records of trials will be kept by the first Staff Judge Advocates General office in the internment facility's chain of command. These records will be open to inspection by representatives of the Protecting Power.

f. In each trial by court-martial, accused persons will be entitled to assistance by one of his prisoner comrades, a qualified advocate or counsel of their own choice, to the calling of witnesses, and services of a competent interpreter, if needed. The commander concerned will appoint a Judge Advocate to serve as defense counsel in additional to any other counsel of the accused person's choice. The commander concerned will notify the accused person of these rights in ample time before the trial.

(1) If the accused does not exercise the right to choose an advocate or counsel, notice to that effect will be sent through the NPWIC to the Protecting Power to permit the Protecting Power to choose counsel. If the accused and the Protecting Power fail to choose an advocate or counsel, the commander concerned shall appoint a counsel, which in normal circumstances will be the judge advocate previously appointed. The accused person must consent to the service of the appointed advocate or counsel.

(2) If requested by the accused person, the commander concerned will appoint an interpreter to assist the accused person during the preliminary hearing and the hearing in court. The interpreter must not be a trial counsel, a defense counsel, an assistant to either, a witness, or have any bias or interest in the case. Accused persons have the right to object to the interpreter appointed, and to ask for a replacement.

(3) A judge advocate will serve as defense counsel in any general or special court-martial of an EPW/RP.

g. Representatives of the Protecting Power may attend the trial. It may be decided that in the interest of security, the trial will be conducted with the public excluded. If so, a notice will be given to NPWIC at least 3 weeks before the trial opens to permit notice to the Protecting Power.

h. Two copies of the findings and the sentence, if applicable, will be forwarded immediately to NPWIC. A summary will be sent to the Protecting Power, and the detainee representative. Notice of the EPW, RP decision to use or waive the right of appeal to the Court of Appeals for the Armed Forces, when review by that court is not mandatory, will also be forwarded (in duplicate) to HQDA (DAMO-ODL) NPWIC, WASH, DC 20310-0400. NPWIC will send a copy of the decision to the Protecting Power. An EPW, RP waiver of the right to appeal will in no way affect, or change the requirement for, review by a supervisory authority, a board of review, or the U.S. Court of Military Appeals when such review is required under the UCMJ. If the sentence adjudged is death, one copy of the court-martial record of trial will be forwarded to ODCSOPS, NPWIC. NPWIC will send a copy of the record of trial to the Protecting Power. The following information will be included:

(1) A precise wording of the approved finding and sentence.

(2) A summary report of the evidence, including any preliminary investigation, elements of offenses, and any defense raised thereto.

(3) If applicable, the place where the detainee will serve confinement.

i. A sentence to confinement imposed on EPW, or RP will be served in the same type of place and under the same conditions as in the case of a member of the U.S. Armed Forces. EPW and RP sentenced to U.S. Disciplinary Barracks (USDB) or Federal penitentiaries will remain EPW/RP. Accountability requirements will be coordinated prior to any transfer by the losing confinement authority, USDB through HQDA (DAMO-ODL) NPWIC. Accused persons and the Protecting Power will be informed as soon as possible of all offenses that are punishable by the death sentence under U.S. laws. Lists of these offenses will be posted in all camps. Duplicate lists will be given to detainee representatives. Other offenses will not thereafter be made punishable by the death penalty without the concurrence of the power on which the detainee depends.

(1) An EPW or RP can be sentenced to death only if the court has taken into consideration, to the maximum extent possible, the fact that the accused is not a US citizen and is not bound to it by any duty or allegiance and is in US custody as a result of circumstances beyond their own will or control.

(2) If the death sentence is pronounced, it will not be carried out until 6 months have passed from the date the Protecting Power received the U.S. notice of the judgment and sentence.

(3) ODCSOPS will monitor and acknowledge when the ICRC/Protecting Power has received the notice terminating the execution of the sentence.

3–9. Loss or damage to property

a. Persons will be held responsible for the loss of, or damage to, any Government property through negligence or wrongful acts. A complaint may be made to the installation commander that property of a private person has been destroyed, lost, or damaged by a person interned at the installation, including any branch camp. If the EPW, RP does not accept responsibility for the damage, the commander will appoint a board of one to three officers to investigate the complaint.

b. Reports of survey or statements of charges will be processed according to AR 735-5. For this purpose, the commanding officer of an internment facility will be considered an installation commander. Amounts collected will be disposed of according to AR 735-5.

c. Supporting EPW/CI PSYOP units can assist the commanding officer in improving relations with local populations following loss or damage to private property.

3–10. Death and burial

a. For general procedures and authorized expenses for the care and disposition of remains see AR 638-30 and AR 600-8-1.

b. When EPW and RP have chosen to make a will, the original will and two certified copies will be forwarded to the supporting PWIC upon death or at their request.

c. When an EPW or RP or U.S. custody dies, the attending medical officer will immediately furnish the camp (or hospital) commander or other officer charged with their custody before death, the following information:

(1) Full name of deceased.

(2) ISN of deceased.

(3) Date, place, and cause of death.

(4) Statement that death was, or was not, the result of the deceased's own misconduct.

(5) When the cause of death is undetermined, the attending medical officer will make a statement to that effect. When the cause of death is finally determined, a supplemental report will be made.

d. The camp or hospital commander, or other officer charged with custody of the person before death, will notify the proper Branch PWIC immediately, by telegram or the most expeditious means, of the death. The data listed in subparagraph *c* above will be included. If the required data has not been determined, a supplemental report will be made as soon as possible.

e. The attending medical officer and the appropriate camp commander will complete a DA Form 2669-R (Certificate of Death). DA Form 2669-R will be reproduced locally on 8 1/2 by 11-inch paper. The form is located at the back of this regulation. This form is for the use of Army only. Enough copies of form will be made out to provide distribution as follows:

(1) Original—information center.

(2) Copy—information center (branch), if necessary.

(3) Copy—The Surgeon General.

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(4) Copy—EPW or RP personal file.

(5) The proper civil authorities responsible for recording events in the particular state if the EPW dies in the United States.

f. Investigating officer's report.

(1) The camp commander will appoint an officer to investigate and report:

(a) Each death or serious injury caused by guards or suspected to have been caused by guards or sentries, another detainee, or any other person.

(b) Each suicide or death resulting from unnatural or unknown causes.

(2) One copy of the investigating officer's report will be forwarded to the NPWIC.

(3) USACIDC special agents will investigate deaths from other than natural causes per AR 195-2. A copy of the USACIDC report of investigation, if any, will be attached to the camp commander's report.

g. Burial, record of interment, and cremation. Deceased detainees will be buried honorably in a cemetery established for them according to AR 638-30. Deceased detainees will be buried, if possible, according to the rites of their religion and customs of their military forces. Unless unavoidable circumstances require the use of collective (group or mass) graves, detainees will be buried individually. Graves Registration Services will record any later movement of the remains. The United States will also care for the ashes of cremated persons. Ashes will be kept by Graves Registration Service persons until proper disposal can be decided according to the wishes of the power on which that person depended. A body may be cremated only due to imperative hygiene reasons, the detainee's religion, or the detainee's request for cremation. When a body is cremated, this fact together with the reasons will be set forth in the death certificate.

h. Burial at sea and after land transfer. If a detainee dies at sea, the body will not be buried there unless absolutely necessary. If the body has to be buried at sea, the procedures prescribed for U.S. troops will be followed as far as possible; however, a U.S. flag will not be used. When death occurs during a land transfer, the responsible officer will follow the same procedures for burial prescribed for U.S. military personnel.

i. The personnel file of a deceased person with all pertinent records will be forwarded to the Branch PWIC.

3–11. Transfer of prisoners of war

a. General. Permanent transfer of EPW in the custody of the U.S. forces to the host nation or other allied forces requires approval of the Secretary of Defense (SECDEF). The permanent transfer of EPW to foreign national control will be governed by bilateral national agreement and in accordance with subparagraph b below following SECDEF approval. Temporary transfer of EPW/RP to accommodate surges in prisoner population beyond the immediate capability of U.S. forces to manage is authorized. Theater commanders will develop measures to ensure accountability and humane treatment of prisoners so transferred.

b. EPW/RP may only be transferred from the custody of the United States to a power which is a party to the GPW, and only after a representative of the United States has visited the Power's internment facilities and is satisfied that the Power in question is willing and able to apply the GPW. EPW/RP transfers should not increase the difficulty of repatriation. Prisoners of war during transfer will have sufficient food and drinking water to keep them in good health, and will be provided adequate clothing, shelter, and medical attention. Precautions will be taken, especially in case of transport by sea or by air, to ensure their safety during transfer. A complete list of all transferred prisoners will be made before their departure and maintained by the Branch PWIC.

c. The supporting Branch PWIC and NPWIC will be notified immediately by the EPW camp commander of any EPW or RP transferred.

d. Transfer within the territory of the detaining power will always be carried out humanely and in conditions no less favorable than those enjoyed by the troops of the detaining power during their movements. If EPW/RP are transferred on foot, only those who are fit to walk may be so transferred. The EPW/RP will not be exposed to excessive fatigue during transfer by foot.

e. The sick, wounded, or infirm EPW and RP as well as maternity cases will be evacuated through U.S. military medical channels and will remain in medical channels until they are certified "fit for normal internment" by competent medical authorities.

f. Necessary clothing, adequate shelter, and medical attention will be made available.

g. Suitable precautions will be taken to prevent EPW and RP, from escaping and to ensure their safety. Wounded and sick EPW and RP will not be transferred as long as their recovery may be endangered by the journey, unless their safety demands it.

h. The EPW and RP will be permitted to take with them their personal effects and property. The weight of their baggage may be limited if the conditions of transfer so require, but in no case will it be limited to less than 55 pounds per EPW/RP. The personal property that the EPW and RP are unable to carry will be forwarded separately.

i. The mail and parcels addressed to EPW and RP who have been transferred will be forwarded to them without delay.

j. Property, such as that used for religious services, or items donated by welfare agencies, will be forwarded as community property. These items are not to be considered a part of the 55 pounds of personal effects and property that each EPW is authorized to take.

k. When EPW and RP are to be transferred, they will be notified of their new postal addresses before departure. Notice will be given in time to pack and tag their luggage. They will also be given time to inform their next of kin and the Branch PWIC of their transfer and new address.

l. EPW and RP will not be confined in a jail or other correctional institution during transfer except in an emergency. They will be confined only in such fashion while the circumstances that necessitate the measures continue to exist. Transfer will be effected under conditions not less favorable than those under which U.S. Armed Forces are transferred.

m. Receipt of transferred EPW/RP.

(1) EPW and RP will not be accepted for detainment or transfer to U.S. Military control from outside nations without prior approval from SECDEF. EPW and RP received by transfer from an allied nation will be properly receipted for by the officer designated to accept them. The receipt will indicate the place and date the United States assumed custody and the name, grade, ISN, and nationality of each transferred EPW and RP. Three or more copies of the receipt will be prepared. The original, plus one copy, will be delivered to the commander of the camp to which the EPW and RP are assigned. Upon receiving the copies, the camp commander will forward immediately one copy directly to the Branch PWIC, or to the NPWIC if the Branch PWIC is not operational. A DA Form 4237-R or an allied equivalent form for individuals listed on the receipt should be delivered to the accepting officer at the time the transfer is effected.

(2) EPW and RP transferred between EPW facilities and hospitals will be receipted for as above when there is little chance that the EPW/RP will be returned to the original camp. When EPW and RP are transferred to hospitals outside the jurisdiction of the EPW/CI camp, the hospital commander is required to submit their strength accountability reports to the supporting branch PWIC.

(3) The use of a manifest identifying the name, rank/status, ISN, power served/nationality, and physical condition of each EPW and RP transferred and received is required. The manifest will be attached to the original receipt of transfer and forwarded to the Branch PWIC.

n. EPW and RP captured or detained by the U.S. Marine Corps, Navy, Air Force, or Coast Guard are turned over to the U.S. Army at receiving points designated by the Theater Commander.

(1) All inter-service transfers should be effected as soon as possible after initial classification and administrative processing has been accomplished.

(2) CI will only be transferred within theater, unless directed by DOD.

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(3) A manifest is required to identify as a minimum: the name, rank/status ISN (if assigned), power served/nationality, and physical condition of each EPW and RP transferred and received. The manifest will be attached to the receipt of transfer and will become a permanent record to assure accountability of each prisoner.

o. When EPW are moved to a port of debarkation from an interior point, the theater commander will provide for:

(1) Transportation of the EPW up to and including their departure from the port.

(2) Care and security of the EPW, their baggage, monies, other valuables, and records until their custody is assumed by the CONUS EPW command.

p. Transfers between Army commands. The EPW's command, with the advice of military medical authority, is authorized to transfer injured, sick, and wounded EPW to other commands.

q. Transfer of personal effects.

(1) Each EPW and retained person will be permitted to hand carry personal effects and property not to exceed 55 pounds.

(2) EPW/RP who have been serving as chaplains or clergymen during their internment will be permitted to transfer, at Government expense, an additional 110 pounds to take other religious materials with them.

r. The transfer of physically disabled, insane, mentally incompetent, or wounded EPW/RP in a theater of operations will be according to procedures set up by the Theater Commander.

s. When a railroad car other than an U.S. Military-owned or operated hospital car is used to transfer EPW or RP persons, Red Cross signs will be placed on the inside of the middle window of each side of the car and on the outside of each door window of the car. These signs will be made of white paper or cardboard with a large red cross in the center of the sign. The word "hospital" will be placed above, and the word "car" below the red cross, in black letters. When EPW/RP patients are transferred in a compartment, drawing room, bedroom, or roomette, a sign as described above, with the exception of the word "car," in proportionate dimensions will be placed on the outside of the door of the compartment, drawing room, bedroom, or roomette.

t. Theater commanders are subject to the general restrictions on transfers contained in this regulation. They may transfer injured, sick, or wounded EPW who are within their commands to or from hospitals designated by the theater surgeon or Commander, HSC with guidance from the Joint Medical Regulation Office (JMRO) or the Theater Patient Movement Requirements Center (TPMRC) if:

(1) The EPW requires prolonged hospitalization or specialized treatment, including surgery, that is not available locally.

(2) The transfer is recommended by a medical officer after an examination of the EPW.

u. When EPW no longer require hospital care, they may be returned to the command from which transferred or to an EPW camp within the receiving command.

3–12. Repatriation of sick and wounded EPW/RP

a. Sick and wounded prisoners will be processed and their eligibility determined for repatriation or accommodation in a neutral country during hostilities. Such will be according to the procedures set forth below.

(1) Sick and wounded prisoners will not be repatriated against their will during hostilities.

(2) Procedures for a Mixed Medical Commission will be established by HQDA, according to this regulation and Annex II of the GPW. The purpose of the Commission will be to determine cases eligible for repatriation. The Mixed Medical Commission will be composed of three members. Two of the members, appointed by the ICRC and approved by the parties to the conflict, will be from a neutral country. As far as possible, one of the neutral members will be a surgeon and the other a physician. The third member will be a medical officer of the U.S. Army selected by HQDA. One of the members from the neutral country will act as chairman.

b. If for any reason the use of neutral doctors cannot be arranged for by the ICRC, the United States, acting in agreement with the Protecting Power concerned, will set up a Medical Commission. This Commission will perform the duties of a Mixed Medical Commission.

c. The Mixed Medical Commission will:

(1) Examine EPW, and RP who have applied for repatriation.

(2) Inspect clinical records pertaining to these EPW.

(3) Determine those cases eligible for repatriation or hospitalization in a neutral country.

d. Decisions made by the Mixed Medical Commission will be a majority vote and cannot be changed to the detriment of the EPW and RP examined, except upon concurrence of the Commission.

e. The decisions made by the Mixed Medical Commission on all cases will be communicated to HQDA (DAMO-ODL), NPWIC, the Protecting Power, and the ICRC during the month following the Commission's visit. Each EPW and RP examined will be informed by the Mixed Medical Commission of the decision made on the case.

f. The United States will carry out the decisions of the Mixed Medical Commission as soon as possible and within 3 months of the time after it receives that notice of the decisions.

g. The U.S. member will arrange all administrative details to expedite the work of the Commission. Commanders concerned will assist, facilitate, and expedite the operations of the Commission to the fullest extent.

h. The EPW and RP noted below will be examined by the Mixed Medical Commission.

(1) EPW and RP designated by a camp or hospital surgeon or a retained physician or surgeon who is exercising the functions of the surgeon in a camp.

(2) EPW and RP whose applications are submitted by a prisoner representative.

(3) EPW and RP recommended for examination by the power on which the EPW and RP depend or by an organization duly recognized by that power and that gives assistance to them.

(4) EPW, RP who submit written requests. These EPW will not be examined until the EPW listed in (1), (2), and (3) above have been examined.

i. An EPW or RP found ineligible by the Mixed Medical Commission may apply for reexamination 3 months after the last examination.

j. Each commander will be notified before arrival of the Commission. Before arrival of the Commission at a camp, hospital, or other designated place, the commander will prepare DA Form 2670-R (Mixed Medical Commission Certificate for EPW) and update and make available the records. For each EPW and RP to be examined, DA Form 2670-R will be completed in four copies. DA Form 2670-R will be locally reproduced on 8 1/2 by 11-inch paper. This form is located at the back of this regulation. This form is for the use of Army only.

k. The commanding officers of designated hospitals will complete DA Form 2671-R (Certificate of Direct Repatriation for EPW) and forward to the Branch PWIC. DA Form 2671-R will be locally reproduced on 8 1/2 by 11-inch paper. The form is located at the back of this publication. This form is for the use of Army only. The certificate will be in four copies to:

(1) Make the repatriation of sick and wounded EPW, RP easier.

(2) Relieve the Mixed Medical Commission of the need to visit EPW and RP patients who are eligible for direct repatriation.

l. The following EPW and RP are eligible for direct repatriation:

(1) EPW and RP suffering from disabilities as a result of injury, loss of limb, paralysis, or other disabilities, when these disabilities are at least the loss of a hand or foot, or the equivalent.

(2) Sick or wounded EPW and RP whose conditions have become chronic to the extent that prognosis appears to preclude recovery in spite of treatment within 1 year from inception of disease or date of injury.

m. The original and one copy of DA Form 2671-R will be forwarded to ODCSOPS, NPWIC. The other two copies will be attached to the clinical record. In all instances, these records will accompany the records of the EPW or RP when transferred.

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3–13. Repatriation of other EPW/RP

Prisoners who are not sick or wounded will be repatriated or released at the cessation of hostilities as directed by OSD.

3–14. Repatriation transfer procedures

a Control and accountability of EPW and RP will be maintained until the EPW or RP is receipted for by the serving power or designated protecting power.

b The use of a manifest identifying at the minimum: name, rank/status, ISN, power served/nationality, and physical condition of each EPW and RP transferred is required. The manifest will be used as an official receipt of transfer and will become a permanent record to assure accountability of each EPW and RP until final release.

c Copies of appropriate personnel, finance, and medical records will accompany the released and/or repatriated EPW/RP. These records will be transferred to the custody of the designated official receiving the EPW/RP.

d All confiscated personal property that can be released, will accompany the released or repatriated EPW/RP. An inventory will be conducted and any discrepancies identified. The individual will sign a property receipt for his personal items.

e Upon completion of the transfer, the U.S. escort guard will forward the official receipt of transfer to the Branch PWIC.

f Upon notification from the PWIC that the transfer is complete, the losing EPW or RP internment facility will forward all official records and confiscated property that cannot be released to the Branch PWIC for final disposition.

g The PWIC will:

(1) Notify the NPWIC of final status of released/ repatriated EPW and RP.

(2) Forward all EPW and RP records and reports per AR 25-400-2, The Modern Army Recordkeeping System (MARKS).

(3) Dispose of confiscated property in their possession per instructions received from the NPWIC and applicable Army Regulations.

3–15. Retained personnel

a Enemy personnel entitled to a retained status should have on their person at the time of capture a special identity card attesting to their status. The minimum data shown on the card will be the name, date of birth, grade, and service number of the bearer. The card will state in what capacity the bearer is entitled to the protection of GPW. The card will also bear the photograph of the owner and either the signature or fingerprints or both. It will be embossed with the stamp of the military authority with which the person was serving at time of capture.

b Enemy personnel who fall within any of the following categories, are eligible to be certified as RP:

(1) Medical personnel who are members of the medical service of their armed forces.

(2) Medical personnel who are exclusively engaged in:

(a) The search for or the collection, transport, or treatment of the wounded or sick.

(b) The prevention of disease.

(c) Staffs exclusively engaged in administering medical units and establishments.

(3) Chaplains.

(4) The staff of the National Red Cross, Red Crescent, and other voluntary aid organizations. These organizations must be duly recognized and authorized by their governments. The staff of these organizations may be employed on the same duties as persons in (2) above, if such organizations are subject to military laws and regulations.

c RP whose status is certified will not be considered as EPW; however, they will receive the benefits and protection of an EPW.

d EPW who are certified to be proficient medically or religiously continue to be considered and identified as EPW, as appropriate, but will be administered and treated in the same way prescribed for RP. Enemy personnel who are classified in these categories and are determined qualified by competent Army authority are eligible to be certified as proficient to perform medical or religious duties.

(1) EPW who are ministers of religion; however, they have not officiated as chaplains to their own forces.

(2) Specially trained EPW, employed at the time of their capture as hospital orderlies, nurses, or auxiliary stretcher-bearers, in search for, or in collecting, transporting, or treating of the wounded and sick. These EPW are not eligible for RP status but may be employed only on medical duties they are qualified to perform.

e Certification of the retained status of personnel will be effected upon the decision that the special identity card held by each such person is valid and authentic. This certification will be effected, if possible, at the time of processing by the camp commander.

f The Theater Commander, or CINCUSACOM will confirm the certification of the technical proficiency of the persons described in paragraph 3-15d. Qualified U.S. Military medical and religious personnel must first confirm the medical or religious proficiency of each EPW.

g Classification forms will be completed as follows:

(1) DA Form 2672-R (Classification Questionnaire for Officer Retained Personnel) will be completed in three copies by captured officers and civilians of equal grade who have or:

(a) Claim RP status.

(b) Are applicants for a certificate of medical proficiency. DA Form 2672-R will be locally reproduced on 8 1/2 by 11-inch paper. The form is located at the back of this publication. This form is for the use of Army only.

(2) DA Form 2673-R (Classification Questionnaire for Enlisted Retained Personnel) will be completed in three copies by all captured enlisted persons and civilians of equal grade who have or are applicants for a certificate of medical proficiency. DA Form 2673-R will be locally reproduced on 8 1/2 by 11-inch paper. The form is located at the back of this publication. This form is for the use of Army only.

h The camp commander will retain one copy of each of the forms noted in subparagraph g above. The second will be forwarded to the next higher commander. The third copy will be forwarded to the Branch PWIC.

i Verifications of retained status and religious or medical proficiency will be recorded on the DA Form 4237-R of the person concerned. Denials of claims to retained status or certification of proficiency will also be recorded together with a brief statement of the reasons.

j RP are subject to the internal discipline of the camp in which they are retained; however, they may not be compelled to do any work except that relating to their medical or religious duties.

k RP, who are members of the enemy's Armed Forces, will be assigned to EPW camps. If available, they will be assigned in the ratio of two physicians, two nurses, one chaplain, and seven enlisted medical personnel per 1,000 EPW. Economy of medical staffing may be achieved at higher levels per guidance from Commanding General, HSC. As much as possible, these RP will be assigned to camps containing EPW from the same Armed Forces upon which the RP depend.

l CINCs, Task Force Commanders, Joint Task Force Commanders are authorized to transfer RP and EPW who are qualified to perform medical or religious duties between EPW camps within their jurisdiction in order to distribute them equitably.

m Subject to security requirements the theater commander will ensure:

(1) Full use of enemy medical personnel for the treatment of sick and wounded EPW/RP.

(2) Release of U.S. medical personnel, when possible, from caring for sick and wounded EPW except for supervision and training of enemy medical personnel.

n The senior medical officer in each camp will provide close and continuing supervision of the professional activities of the retained medical persons and report all improper activities.

o RP will not be allowed access to or custody of narcotic drugs or other controlled substances as delineated in Title 21, United States Code, except under close supervision of U.S. medical personnel.

p EPW camp surgeons or hospital commanders at which retained persons are used will verify:

(1) Accuracy of the final diagnosis.

(2) Adequacy of treatment.

(3) Final disposition of patients treated by RP.

q While caring for the sick and wounded, RP will receive the same daily rate of pay as is received by EPW.

r Monthly allowances for RP will be the same as those prescribed for EPW of the same rank.

s RP may be detained in EPW camps. When practical, they will be assigned quarters separate from EPW.

t RP will wear on their left sleeve a water resistant arm band bearing the distinctive emblem (Red Cross, Red Crescent) issued and stamped by the military authority of the power with which they have served. Authorized persons who do not have such armbands in their possession will be provided with Geneva Convention brassards (AR 670-1).

u RP will enjoy the same correspondence privileges as EPW. Chaplains will be free to correspond, subject to censorship, on matters about their religious duties. Correspondence may be with ecclesiastical authorities both in the country where they are retained and in the country on which they depend, and with international religious organizations. RP will be authorized the following additional privileges:

(1) They will be granted facilities necessary to provide EPW with medical care, spiritual assistance, and welfare services.

(2) They will be authorized to visit EPW periodically in branch camps and in hospitals outside the EPW camps in order to carry out their medical, spiritual, or welfare duties.

(3) They will be given the necessary means of transportation for making such visits.

(4) The senior retained medical officer, as well as chaplains, will have the right to correspond and consult with the camp commander or his or her authorized representatives on all questions about their duties.

v RP are subject to the same disciplinary measures as are EPW.

w RP will be retained only insofar as the state of health, the spiritual needs, and the number of EPW require. Persons whose retention is not required will be repatriated as soon as military requirements permit. Nothing precludes reasonable measures to prevent such persons from carrying information of strategic or tactical value. Should they come into possession of such information, their return to their own armed force may be delayed until the information is of no significant value.

3–16. Complaints and requests to camp commanders

a EPW and RP have the right to make complaints and requests to camp commanders and the ICRC/protecting powers regarding the conditions of their internment. EPW and RP may not be punished for making complaints, even if those complaints later prove unfounded. Complaints will be received in confidence, as they might endanger the safety of other detainees. Appropriate action, including segregation, will be taken to protect detainees when necessary. This policy also applies to persons who are confined pending trial or as a result of a trial.

b EPW and RP may make complaints or requests to the camp commander.

c Persons exercising the right to complain to the ICRC or protecting power about their treatment and camp may do so:

(1) By mail.

(2) In person to the visiting representatives of the ICRC or protecting power.

(3) Through their detainee representative.

d Written complaints to the protecting power will be forwarded promptly through HQDA, ODCSOPS (DAMO-ODL) NPWIC. A separate letter with the camp commander's comments will be enclosed. Military endorsements will not be placed on a detainee's communication.

e If an ICRC/protecting power communicates directly with an EPW/CI camp commander about any matter requiring an answer, the communication and commander's reply will be forwarded to HQDA, ODCSOPS (DAMO-ODL) NPWIC, for proper action.

f Any act or allegation of inhumane treatment will be investigated and, if substantiated, reported to HQDA as a Serious Incident Report (SIR) per AR 190-40. Once completed, a copy of the SIR accompanies the prisoner to the EPW/CI camp, and a copy is furnished to the monitoring Branch PWIC. All available personnel information that the EPW or RP is willing to give, will be entered on the form.

3–17. EPW/RP safety program

A safety program for EPW and RP will be set up and administered in each EPW camp. Army regulations, circulars, and pamphlets in the 385-series may be used as guides for establishing an EPW and RP safety program. Accident injury forms used in the EPW and RP safety programs will be prepared, administered, and maintained separately from those prepared for other persons included under the Army Safety Program.

Chapter 4
Employment and Compensation for EPWs

Section I
General Policy and Guidelines

4–1. General principles

a To the extent possible, EPW will be employed in work needed to construct, administer, manage, and maintain EPW camps. EPW will be employed in other essential work permitted by this regulation only when qualified civilian labor is not available. Essential work is work that must be done, despite the availability of EPW.

b EPW labor, external to DOD, is regulated by contract. When authorized by theater directives, EPW, RP may be given advance pay. Procedures for administering this advance pay are set forth in AR 37-1.

4–2. Restricted employment

a EPW will not be employed in positions that require or permit them:

(1) Access to classified defense information or records of other personnel.

(2) Access to telephone or other communication systems.

(3) Authority to command or instruct U.S. personnel.

b EPW may be employed in the following types of labor:

(1) EPW camp administration, installation, or maintenance.

(2) Agriculture.

(3) Public works, public utilities, and building operations which have no military character or purpose.

(4) Transportation and handling of stores which are not military in nature or purpose.

(5) Domestic service.

4–3. Liability to perform labor

a Subject to the limitations stated in paragraph 4-5 and 4-6, EPW will be required to perform any and all work consistent with their grade and status as follows:

(1) Officer EPW. Officer EPW will not be required to work. Officer EPW, however, may make a written request for work. The camp commander will provide such work, if feasible. Officer EPW may, at any time, revoke a voluntary request for work. Officer EPW are required to maintain their personal areas, equipment and other items/areas in a manner that promotes good health and personal hygiene.

(2) Noncommissioned officer (NCO) EPW. NCO EPW will be required to do supervisory work only. NCO EPW, however, may make a written request for work other than supervisory work. NCO

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EPW may, at any time, revoke a voluntary request for work other than supervisory work.

(3) Enlisted EPW. Enlisted EPW will be required to do any and all work consistent with this regulation.

b. Fitness of EPW for labor will be verified at least once a month by medical examination. An attending medical officer will classify the level of physical fitness EPW can perform for work as follows: heavy work, light work, and no work. Lists of these individual labor levels of EPW will be posted in each EPW camp. If physical conditions permit, each EPW will perform labor as directed by the camp commander.

4–4. Authorized work

a Categories. Levels of work for which each EPW are authorized and may be compelled to perform are categorized as follows:

(1) Restricted work. EPW may be compelled to perform the following types which may not be of a military nature or purpose:

(a) Public works and building operations. The primary factor in deciding whether EPW may be employed is the nature of the construction being undertaken. If the construction is purely military in nature, each EPW may not be compelled to engage in such work. If the construction is not purely military in nature, the purpose for which the structure is to be used is the deciding factor. If the completed construction is intended to be used primarily by units engaged in, or in direct support of, military operations against the enemy, EPW may not be compelled to work on the project.

(b) Transporting and handling stores. The first consideration is the nature of the property being handled. If the stores are military in nature, EPW may not be compelled to transport or handle them. If the items are not military in nature, then their purpose is the deciding factor. EPW may not be required to transport or handle items specifically consigned to units engaged in military operations. EPW and RP may, however, be required to handle stores when handling is incidental to the performance of authorized types of work. For example, work in a military mess may be classified as domestic service. Handling of rations by EPW in connection with domestic service may be required.

(c) Public utility services. Construction, repair, or maintenance of water, sewage, drainage, gas, or electrical facilities are not of an inherent military nature. The purpose of these services is the deciding factor as to whether or not EPW may be compelled to engage in such activities. Such services may be intended primarily or exclusively for the benefit of units engaged in, or directly supporting, operations against the enemy. If so, EPW may not be required to perform these services. On the other hand, services intended primarily or exclusively for other purposes represent work that EPW may be compelled to perform.

(2) Nonrestricted work. EPW may be compelled to perform types of work listed below having no direct military purpose.

(a) Construction, administration, management, and maintenance of EPW camps.

(b) Agriculture.

(c) Manufacturing industries, with the exception of metallurgical, machinery, and chemical industries.

(d) Commercial business and arts and crafts.

(e) Domestic service, including a clothing repair shop, laundry, bakery, or a mess hall.

4–5. Unauthorized work

a Unhealthy or dangerous work. EPW and RP may not be employed in any job considered injurious to health or dangerous because of the inherent nature of the work, the conditions under which it is performed, or the person's physical unfitness or lack of technical skill. A specific task should be considered, not the industry as a whole. The specific conditions for each job are the deciding factors. For example, an otherwise dangerous task may be rendered safe by the use of safety equipment. Likewise, an otherwise safe job may be dangerous because of the circumstances under which the work is required to be done. Similarly, dangerous work may be safe for those whose training and experience have made them accustomed to it. EPW will not be employed in tasks requiring:

(1) Exertion beyond physical capacity.

(2) Use of inherently dangerous mechanisms or materials such as:

(a) explosives or mine removal.

(b) Mechanisms that are dangerous because the person is unskilled in their use.

(3) Climbing to dangerous heights or exposure to risk of injury from falling objects under motion and not under full control.

b. Humiliating work. No person will be assigned labor that is humiliating or degrading for a member of the U.S. Armed Forces. This prohibition does not prevent EPW from doing ordinary and frequently unpleasant tasks such as maintaining sanitation facilities, ditch digging and manual labor in agriculture.

c. Other specifically prohibited work. Certain occupations or types of work are prohibited for safety, security, or other reasons. EPW and RP will not be:

(1) Permitted to work in an area where they may be exposed to combat zone fire.

(2) Employed as personal servants to members of the U.S. Armed Forces.

(3) Employed to tend bars or serve alcoholic beverages in officers' messes or similar establishments.

(4) Permitted to work inside correctional facility walls or near inmates.

d. Questionable work. In case of doubt as to whether certain work is authorized, the next higher HQ Staff Judge Advocate (SJA) will review the proposed tasks. The purpose of the review will be to ensure consistency with this regulation and the law of war. The SJA will provide recommendations in writing to the camp commander. A copy will be forwarded to HQDA (DAJA-IA), WASH DC 20310-2214.

4–6. Decisions on work conditions and safeguards

Commanders will make on-the-job decisions as to whether work is safe. They will take into account the guidance set forth in this regulation. Commanders will make decisions by ordinary standards of sound judgment, assisted by the informed advice of persons familiar with the occupations and other available data. Data will include the opinions of the SJA. Preliminary job training will be given when necessary and; protective clothing and accessories will be provided as required (e.g., hard-toed shoes, goggles, and gloves). Such safety devices will be equal to safeguards provided for civilian labor. Commanders will make periodic inspections to ensure satisfactory conditions and safeguards are maintained at all times.

4–7. Referrals to HQDA, ODCSOPS

a. When substantial doubt exists as to whether or not a type of work is permissible according to this regulation, a request to ODCSOPS for specific instructions will be made through channels by the most expeditious means.

b Each question forwarded will be accompanied by a statement as to:

(1) Type and place of work.

(2) Tasks to be performed.

(3) Number of EPW to be employed.

(4) Other facts having a direct bearing on the employment.

4–8. Length of workday

a The length of the workday for EPW, including the time for travel will not exceed that permitted for civilians in the locale who are employed in the same general type of work. The working period may be extended but will not be considered excessive because EPW are laboring under a task system. EPW contracts will contain specific terms on the hours of employment.

b Except as provided in subparagraph *c* below, the EPW will not be required to work more than 10 hours (in one day) exclusive of a one hour lunch and rest period. They will not be kept out of camp for more than 12 consecutive hours, including travel time. Rest

00000110

cycles consistent with the wet bulb, black globe temperature will be monitored and followed.

c EPW may be required to work any number of hours for the efficient operation of the EPW compound messes. EPW are responsible for preparing food within these messes.

4–9. Rest periods

a. Day of rest. Each EPW will be allowed a rest period of 24 consecutive hours every week. These hours will preferably be on Sunday or on the day of rest in the prisoner's country of origin or as established by his or her religious affiliation.

b Annual. Each EPW who has worked for one full year will be given a rest of eight consecutive days during which the U.S. will give working pay to the EPW.

4–10. Responsibility for work supervision

The EPW camp commander will:

(1) Decide, as far as practical, how adequate the technical supervision is which is provided by the using agency.

(2) Report the facts on inadequately supervised details to the using agency.

(3) Refuse to continue details on contract work unless adequate work supervision is provided.

4–11. Work detail leaders and interpreters

EPW camp commanders are authorized to use selected EPW as work detail leaders and interpreters. The time of work detail leaders and interpreters will be included in labor reports under the same project work classification as their details. The supporting EPW/CI PSYOP unit can assist the camp commander in identifying key communicators, informal leaders, and linguists among the camp population for use as work detail leaders and interpreters.

4–12. Task system

The task system will be used when it is possible to predetermine the amount of finished work that an EPW, or group of EPW, can reasonably be expected to complete in a specific period of time.

a Elements of the task system. The task system consists of:

(1) Assigning each EPW, or each group of EPW, a definite and reasonable amount of work to be completed within each workday or other predetermined time period.

(2) Payment for completed work according to this regulation.

(3) Incentive adjustments of the required work according to this regulation.

(4) Penalty measures needed to enforce the task system.

b Decision on daily tasks. The camp commander will decide the reasonable amount of completed work to be required of each EPW or group of EPW during a day.

c Notice to EPW. EPW will be informed of the adoption of the task system before it is put into effect. Each EPW or group of EPW, depending upon whether separate or group tasks are assigned, will be informed of the amount of completed work required each day.

d Incentives. As an incentive, EPW who have completed the required amount of work in less than normal time may be returned to quarters.

e Enforcing the task systems. The camp commander may take disciplinary action against physically qualified EPW who habitually fail to complete the assigned tasks.

4–13. Employing EPW

a The greatest benefit from EPW labor or work projects will be obtained. EPW will be employed, as far as practical, on work for which they are qualified. The Dictionary of Occupational Titles, U.S. Government Printing Office, WASH, DC, will be used as a guide in deciding the qualifications of each EPW.

b In assigning EPW to details requiring special training and skills, the following qualification will be considered.

(1) Technical skills.

(2) Aptitudes.

(3) Past work records.

(4) On-the-job training.

c EPW capable of performing skilled and semi-skilled work should be employed on essential work. Persons on work details that require special training or skill will remain as constant as practical. When it is necessary to substitute an EPW in such a detail, the using agency will be notified.

4–14. Paid work

EPW will be compensated for: performing work for which pay is authorized. The rate of such pay shall be not less than as prescribed in Article 62, GPW. Compensation for all such work will be made as authorized from U.S. Army appropriated funds, canteen funds, or camp EPW funds. Types of paid work for which compensation is authorized are:

a Labor performed for a contract employer or for a Federal agency.

b Services as orderlies and cooks (for officer EPW).

c Services to construct, administer, manage, and maintain EPW camps, branch camps, and hospitals when such services are performed by EPW permanently assigned to certain duties or occupations.

d. Labor of RP for their duties.

e. Spiritual or medical duties required to be performed by EPW for fellow EPW.

f Service as prisoner representative or assistant. Such persons will be paid from the camp EPW fund. If no such fund exists, they will be paid the prescribed rate of pay from U.S. Army appropriated funds.

g Work as detail leaders or interpreters.

4–15. Restriction on paid work

a. Mess personnel. The number of EPW cooks and assistant cooks who will be paid for work in camp messes will in no case exceed the total number authorized for Army enlisted messes of the same or similar size.

b. Fatigue details. Kitchen police, latrine orderlies, and other fatigue details will normally be provided by rotating enlisted EPW. Each EPW assigned to these details will not be paid from Government canteen or camp EPW funds. Assignment of persons to such details by rotation on a duty roster may interfere with the work program. If so, the Camp Commander may assign these duties to EPW who volunteer and whose skills or training are not essential for other work details. In such cases, EPW assigned may be paid the authorized daily rate from canteen credits contributed by all EPW. Payment will be under supervision of the Camp Commander.

c. Gardening work.

(1) To the extent practical, EPW will be required to raise their own vegetables. This work will be classified as paid work.

(2) The produce from gardens operated with EPW labor will be U.S. property. It will be used for the benefit of EPW and U.S. Armed Forces personnel. It should not be sold or traded in civilian markets.

4–16. Rates for paid work

EPW employed for paid work will be compensated at a rate to be specified, on either piecework or by the workday, as provided below.

a Piecework rates. Piecework rates will be used in compensating EPW when the work performed is for a contract employer or a Federal agency other than DOD.

b Working rates. Working rates will be used for compensating all other paid work (other than contract work) as follows:

(1) EPW of all grades, whether acting in a supervisory capacity or otherwise, will be compensated at the authorized daily rate per full workday.

(2) EPW laboring less than the full workday will be compensated in proportion to the number of hours worked, except when working under a task system and having completed the required task, EPW working under a task system will be paid only for the completed parts of the task despite the number of hours worked.

(3) The U.S. work supervisor may decide that an EPW who is not under a task system is producing less than should be produced

00000111

is a full workday. If so, the EPW will be compensated at a rate proportionately lower than the authorized daily rate. Such a decision must be approved by the Camp Commander.

4–17. Days of paid work per month
The maximum number of days of paid work for an EPW will be limited to the number of workdays in a calendar month. The total workdays include the total number of days minus Sunday and any holiday specifically authorized by HQDA, ODCSOPS, (DAMO-ODL) NPWIC.

4–18. Unpaid work
EPW/RP will not be paid for those services connected with administering and maintaining EPW camps, branch camps, and hospitals when such services are performed on a daily rotation or other temporary basis. Unpaid work, in all cases, will include:
a. Kitchen police.
b. Latrine orderlies.
c. Ground police.
d. Other routine fatigue details of the types normally assigned and performed equitably and temporarily by persons in U.S. Army units.

4–19. Sale of articles and repair services
The canteen officer may sell articles made to order for, or repair services performed for, U.S. personnel by EPW. This sale is subject to the following provisions:
a. Articles will be manufactured or repair services will be performed only during the spare time of EPW.
b. No expense to the U.S. will be incurred for equipment, materials, or labor.
c. Repair work or the making of articles to order for U.S. personnel will be prohibited unless an order for the work is placed through the EPW canteen.
d. The canteen officer will fix the price of each article or repair service. The price will reasonably conform to prices for similar articles or services in the civilian market, less the cost of any material supplied by the customer.
e. The canteen officer and the Camp Commander will enter into a blanket contract. Under this contract, the canteen officer will pay to the Camp Commander amounts derived from the sale of articles made to order for, and repair service performed for, U.S. personnel, less a handling charge by the canteen of not more than 10 percent. The canteen officer will submit a voucher monthly to the camp commander. The voucher will list:
(1) The individual sales and services performed during the month.
(2) The price charged for each.
(3) The deductions made for handling charges.
f. The Camp Commander will deposit the amount derived from the sale of articles made to order for, or repair services performed for, U.S. personnel with the U.S. Treasurer. Procedures for these transactions are prescribed in AR 37-1. The EPW will be paid an hourly rate. The rate will not exceed the authorized daily rate for paid work for the services performed. However, in no case will the amount paid to the EPW exceed the price of the article or repair service fixed under subparagraph *d* above. Amounts will be subject to deductions provided for in this regulation. Any residual money will be disbursed by the EPW camp council for use by camp EPW. This disbursement must be approved by the Camp Commander.

4–20. Disability compensation
a. An EPW may be injured or suffer a disability while working under circumstances that may be attributed to work. If so, DA Form 2675-R (Certificate of Work Incurred Injury or Disability) will be completed in four copies. The original will be given to the EPW, the second copy will be forwarded to the PWIC to be sent to the National Prisoner of War Information Center, and the third and fourth will be placed in the EPW's personnel file.

b. A claim by the EPW for compensation for work-incurred injury or disability will be forwarded to the PWIC. The PWIC will send the claim to the Power on which the EPW depends for settlement. A copy of the completed DA Form 2675-R taken from the personnel files of the EPW will be attached to the claim. DA Form 2675-R will be reproduced locally on 8 1/2 by 11 inch paper. This form is for the use of Army only.

4–21. Operation of government vehicles
EPW may be licensed to operate Government motor vehicles according to AR 600-55.

Section II
Contract Employment

4–22. Rules and procedures
Rules and procedures governing the military and contract employment of EPW will be according to the most current contract laws, procedures and guidelines and comply with the provisions of the Geneva Convention. All requests for the contracting of EPW will be forwarded promptly through channels to HQDA, ODCSOPS (DAMO-ODL) and be coordinated with HQDA, DAJA.

Chapter 5
Beginning of Internment (CI)

5–1. General protection policy—civilian internee
a. Treatment.
(1) No form of physical torture or moral coercion will be exercised against the CI. This provision does not constitute a prohibition against the use of minimum force necessary to effect compliance with measures authorized or directed by these regulations.
(2) In all circumstances, the CI will be treated with respect for their person, their honor, their family rights, their religious convictions and practices, and their manners and customs. At all times the CI will be humanely treated and protected against all acts of violence or threats and insults and public curiosity. In all official cases they will be entitled to a fair and regular trial as prescribed by this regulation.
(3) The CI will be especially protected against all acts of violence, insults, public curiosity, bodily injury, reprisals of any kind, sexual attack such as rape, forced prostitution, or any form of indecent assault.
(4) The CI will be treated with the same consideration and without adverse distinction based on race, religion, political opinion, sex, or age.
(5) The CI will be entitled to apply for assistance to the protecting powers, the International Committee of the Red Cross, approved religious organizations, relief societies, and any other organizations that can assist the CI. The commander will grant these organizations the necessary facilities to enable them to assist the CI within the limits of military and security considerations.
(6) The following acts are specifically prohibited.
(a) Any measure of such character as to cause the physical suffering or extermination of the CI. This prohibition applies not only to murder, torture, corporal punishment, mutilation, and medical or scientific experiments, but also to any other measure of brutality.
(b) Punishment of the CI for an offense they did not personally commit.
(c) Collective penalties and all measures of intimidation and terrorism against the CI.
(d) Reprisals against the CI and their property.
(e) The taking and holding of the CI as hostages.
(f) Deportations from occupied territory to the territory of the occupying power or to that of any other country, occupied or not, are prohibited.
b. Authorization to intern. Internment of protected civilian persons in a CI camp is authorized and directed provided that such persons satisfy the requirements for being accorded the status of CI. One of the following two conditions must apply:
(1) Internment has been determined by competent U.S. Military authority to be necessary for imperative reasons of security in the United States Armed Forces in the occupied territory.
(2) Internment has been directed by a properly constituted U.S. military court sitting in the occupied territory as the sentence for conviction of an offense in violation of penal provisions issued by the occupying U.S. Armed Forces.
c. Order for internment.
(1) A protected civilian person in occupied territory will be accepted for evacuation to, and/or for internment in, a CI camp only on receipt of one of the following:
(a) An internment order for imperative security reasons authenticated by a responsible commissioned officer of the United States Military specifically delegated such authority by the theater commander.
(b) An order of an authorized commander approving and ordering the execution a sentence to internment pronounced by a properly constituted U.S. military court sitting in the occupied territory.
(2) The internment order will contain, as a minimum, the following information:
(a) The internee's personal data to include full name, home address, and identification document number, if any.
(b) A brief statement of the reason for internment.
(c) Authentication to include the signature of the authenticating officer over his or her typed name, grade, service number, and organization.
d. Compassionate internment. Notwithstanding the provisions of b and c above, requests by the CI for the compassionate internment of their dependent children who are at liberty without parental care in the occupied territory will normally be granted when both parents or the only surviving parent is interned.
e. Spies and saboteurs.
(1) As individually determined by the theater commander, protected civilian persons who are detained as alleged spies or saboteurs or as persons under definite suspicion of activities hostile to the security of the United States or an occupying power, will be regarded as having forfeited rights of communication with the outside world under the Geneva Convention (GC) for reasons of military security. Such forfeiture will be viewed as an exceptional and temporary measure. Due to the seriousness of the charges, such persons will not be processed as ordinary CI.
(2) Suspected spies and saboteurs will be afforded the same human rights treatment as the CI, and in case of trial, will be accorded the rights of fair and regular trial prescribed by the GC and by this regulation.
(3) When by the direction of the theater commander, suspected spies and saboteurs rights of communication with the outside world have been restored, their internment in a CI camp may be covered in accordance with the provisions stated in paragraphs b and c above. When so interned, they will be accorded full CI status and rights and privileges as provided for by these regulations.
(4) At the earliest date consistent with the security of the United States, they will be released and granted full rights and privileges as protected persons under the GC.
f. Custodial security. The degree of security and control exercised over the CI will reflect the conditions under which their internment is authorized and directed and will recognize the escape hazards and difficulties of apprehension attendant on the internment of the CI in the occupied territory.
g. Appeals and periodic review of security internment cases.
(1) *Appeals.* The CI who are interned for imperative security reasons will be accorded the right to appeal the order directing their internment. Such appeals will be decided with the least possible delay by a board of officers. Appeals will be decided only on the grounds of the existence or nonexistence of imperative security reasons requiring the internment of the protected person.
(2) *Periodic review.* In the case where an appeal has been rejected, the board will review the case at least every 6 months, if possible, to determine whether continued internment is essential to the security of the U.S. Armed Forces.
(3) *Reclassification as assigned residence.* In each CI case reviewed by the board in which continued control is necessary, the CI will be considered for an assignment to a residence in an area where there is adequate control.
h. *Support of dependents.* The United States will financially support the CI's dependents who are at liberty in the occupied territory and are without adequate means of support or are unable to earn a living.

5–2. Civilian Internee Safety Program
a. *Establishment.* A safety program for the CI will be established and administered in accordance with the policies prescribed in AR 385-10 and other pertinent safety directives.
b. *Reports and records.* DA forms and procedures outlined in AR 385-40 will be used in the implementation of the CI safety program. When so used, the letters "CI" will be clearly stamped at the top and bottom of each form. All such forms will be prepared, administered, and maintained separately from those prepared for personnel included under the Army Safety Program.

5–3. Republic of Korea/United States Agreement on processing civilian internees in Korea
a. On 12 February 1982, the United States and Korea signed The Memorandum of Agreement for the Transfer of the CI. The agreement applies to both the Republic of Korea (ROK) Armed Forces and the United States Armed Forces in Korea (USFK) who handle the CI.
b. As a result of this agreement, USFK Regulation 190-6 reflects minor modifications to procedures and forms concerning the processing of CI applicable only to the Korean theater of operations.

Chapter 6
Administration and Operation of CI Internment Facilities

6–1. Internment Facility
a. *Location.* The theater commander will be responsible for the location of the CI internment facilities within his or her command. The CI retained temporarily in an unhealthy area or where the climate is harmful to their health will be removed to a more suitable place of internment as soon as possible.
b. *Quarters.* Adequate shelters to ensure protection against air bombardments and other hazards of war will be provided and precautions against fire will be taken at each CI camp and branch camp.
(1) All necessary and possible measures will be taken to ensure that CI shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigors of the climate and the effects of war. In no case shall permanent places of internment be placed in unhealthy areas, or in districts the climate of which is injurious to CI.
(2) The premises shall be fully protected from dampness, adequately heated and lighted, in particular between dusk and lights out. The sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex and state of health of the internees.
(3) Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene and are constantly maintained in a state of cleanliness. They shall be provided with sufficient water and soap for their daily personal hygiene and for washing their personal laundry; installations and facilities necessary for this purpose shall be provided. Showers or baths shall also be available. The necessary time shall be set aside for washing and for cleaning.
(4) CI shall be administered and housed separately from EPW/

00000112

00000113

RP. Except in the case of families, female ☐ shall be housed in separate quarters and shall be under the direct supervision of women.

c. Marking. Whenever military considerations permit, internment facilities will be marked with the letters "☐" placed so as to be clearly visible in the daytime from the air. Only internment facilities for the ☐ will be so marked.

d. Organizations and operation.

(1) The ☐ internment facilities will be organized and operated, so far as possible, as other military commands.

(2) A U.S. Military commissioned officer will command each ☐ internment facility.

(3) When possible, the ☐ will be interned in ☐ camps according to their nationality, language, and customs. All ☐ who are nationals of the same country will not be separated merely because they speak different languages.

(4) Complete segregation of female and male ☐ will be maintained except—

(a) When possible, members of the same family, particularly parents and children, will be lodged together and will have facilities for leading a normal family life.

(b) A parent with children, if single or married without spouse, will be provided quarters separate from those for single persons.

(c) ☐ may be searched for security purposes. Female ☐ may be searched only by female personnel.

6–2. Administrative processing

a. Military police processing.

(1) Military Police (MP) prisoner of war units officially establish ☐ status and processes the ☐.

(2) Only civilian persons entitled to protected status and that meet the requirements set forth in the GC will be classified as a ☐.

(3) Dependent children, who are interned for compassionate reasons with their parents, will not be classified as ☐ or otherwise processed except as required on DA Form 2674-R (Enemy Prisoner of War/Civilian Internee Strength Report) (RCS CSCP-1583) and DA Form 2663-R. DA Form 2674-R will be reproduced locally on 8 1/2 by 11 inch paper, head to head. A copy for reproduction purposes is located at the back of this regulation. This form is for the use of Army only. Children under the age of twelve are to be identified by the wearing of some form of identity badge or wristband or some other means of identification.

(4) All efforts will be made to take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources.

b. DA Form 2674-R.

(1) General. DA Form 2674-R will be prepared for each ☐ camp and hospital to which ☐ are assigned. Preparation will be in accordance with applicable procedures set forth for EPWs. DA Form 2674-R will be reproduced locally on 8 1/2 by 11-inch paper, head to head. A copy for reproduction purposes is located at the back of this regulation. This form is for the use of Army only.

(2) Personnel to be accounted for. All civilians processed and classified as ☐ and for whom a DA Form 4237-R has been prepared in accordance with paragraph 6-2, of this regulation and dependent children for whom compassionate internment with their ☐ parents has been approved in accordance with procedures prescribed by the theater commander.

(3) Basic personnel data. References to entries in section B, Returns, requiring basic personnel data, will be interpreted as follows.

(a) Name. Enter last names and first names, in that order, alphabetically according to section (assigned game, losses, and so forth) of ☐ and dependent children.

(b) Internment serial number. Enter complete serial number of this regulation (dependent children are not assigned internment serial numbers (ISNs)).

(c) Grade. Civilian capacity or title, ☐ only.

(d) Sex. ☐ and dependent children.

(e) Nationality. ☐ and dependent children. Enter name of country of which persons claim citizenship.

(f) Occupational skill. Applies only to ☐.

(4) Remarks column. On initial entry, enter in the "remarks" column the notation "approved by" (insert appropriate headquarters) on (insert date approved) ☐ and dependent children.

c. Civilian internee personnel record.

(1) DA Form 4237-R will be prepared for each protected civilian processed in an occupied territory as a ☐ or dependent child.

(2) All pertinent information available or which the ☐ is willing to give will be entered on the form. If a ☐ refuses or is unable to give any items of information, a notation will be made in item 36 on DA Form 4237-R. The codes to be used are contained in the Prisoner of War Information System (PWIS) Operator's Manual. Stamp the letters "☐" at the top and bottom of all pages of the form.

(3) All items on DA Form 4237-R are self explanatory except the following entries.

(a) Item 3. Civilian capacity or title (for example, mayor or police chief) if appropriate.

(b) Item 4. Serial number of identification document, if any.

(c) Item 5. Entry of "civilian internee."

(d) Items 19 through 21. Not applicable.

(e) Items 23 through 25. Name of apprehending unit and location, if known.

(f) Item 35. List impounded items from DA Form 1132 (Prisoner's Personal Property List, Personal Deposit Fund) and have the ☐ sign in the appropriate space verifying the impounded items.

(4) Entries will be typed if possible; otherwise, the form will be printed by hand in BLOCK LETTERS.

(5) Once completed, a copy of the form will accompany the ☐ to the ☐ camp. A copy will be furnished to the Branch PWIC monitoring ☐ activity for the theater commander.

d. Internment serial number (ISN). ISNs for each ☐ will be assigned according to the procedure set forth for EPW. The letters A☐@ will be substituted for AEPW@ e.g. US9AB-0001☐.

e. DA Form 2677-R (Civilian Internee Identity Card). Each ☐ will be issued a completed DA Form 2677-R. Notation thereof will be made under item 36 of DA Form 4237-R. DA Form 2677-R will be reproduced locally on 3- by 5- inch card head to foot. (Copy for local reproduction is located at the back of this regulation.) This form is for the use of Army only. All cards will be weatherproof. The ☐ will retain their identity cards at all times.

f. Internment card. On completion of a DA Form 4237-R, but not later than one week after arrival at a ☐ camp, each ☐ must complete two copies of DA Form 2678-R (Civilian Internee Notification of Address). One copy will be addressed to the EPW/☐ information organization and the other copy to a relative or next-of-kin. DA Form 2678-R will be reproduced locally on 4- by 6-inch card, printed head to foot. (Copy for local reproduction is located at the back of this regulation.)

g. DA Form 2663-R. DA Form 2663-R will be completed in duplicate for each ☐ and for each interned dependent child. One copy will be retained at the camp at which the ☐ or dependent child is interned and will accompany internee on transfers; the other copy will be forwarded to the Branch PWIC.

6–3. Personal effects

a. All personal effects, including money and other valuables, of the ☐ will be safeguarded. Personal effects are classified according to their disposition.

b. The personal effects that detainees are allowed to retain, but are taken from them temporarily for intelligence purposes, will be receipted for and returned as soon as practical. Any national identification card or DA Form 2677-R will not be taken from the ☐ at any time.

(1) The camp commander may receive personal effects that the ☐ are permitted to retain, but which they wish stored. Individual receipts will be given to the ☐ for all items stored in this manner.

(2) Any claims by a ☐ for compensation for personal effects, money, or valuables stored or impounded by the United States and not returned upon repatriation or any loss alleged to be the fault of the United States or its agents will be referred to the country to which the ☐ owes allegiance. In all cases, camp commanders will provide the ☐ with a statement, signed by a responsible officer, describing the property not returned and the reason. A copy of this statement will be forwarded to the Branch PWIC.

c. An inventory of personal effects that have been impounded will be entered on DA Form 4237-R, item 35. Also, DA Form 1132 will be completed by the ☐ and signed by the officer in charge or his or her authorized representative and a copy given to the ☐.

d. The commanding officer of the camp where the ☐ is interned will be responsible for storing and safekeeping impounded personal effects. Such property will be marked or otherwise identified and securely bound or packaged. Upon transfer, the ☐'s impounded property will be delivered to the commanding officer of the receiving facility.

e. Money found in the possession of the ☐ will be handled according to AR 37-1.

f. Confiscated items of economic value will be receipted to the proper agency. Items of intelligence interest will be brought to the attention of military intelligence personnel immediately and receipted to them.

g. Personal property and documents of importance to the next-of-kin left by a ☐ who has been released, has died, or has been in an escaped status in excess of 30 days, will be forwarded to the Branch PWIC in sealed parcels. The parcels will be accompanied by statements identifying the ☐ and listing the contents. All parcels will be receipted for by the authorized losing or gaining facility representative.

h. The theater commander will be responsible for retaining and storing other personal effects, pending final disposition instructions from HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400.

6–4. Internee Committee

a. Election. At each camp and branch camp, ☐ will be elected by secret written ballot to the Internee Committee. This committee is empowered to represent the camp to the protecting powers, International Committee of the Red Cross, or other authorized relief or aid organizations and U.S. military authorities.

b. Composition. The Internee Committee will consist of not less than two and not more than three elected members. Elections will be held every 6 months or upon the existence of a vacancy. Committee members are eligible for re-election.

c. Approval. Each member of the Internee Committee will be approved by the camp commander prior to assumption of duty. If the camp commander refuses to approve or dismisses an elected member, a notice to that effect with the reasons for refusal or dismissal will be forwarded through channels to the Branch PWIC for transmittal to the protecting power with a copy furnished to NPWIC.

d. Assistants. Each member of the Internee Committee may have an assistant to act as an interpreter. The interpreter must be approved by the camp commander.

e. Duties.

(1) The Internee Committee will be responsible for furthering the physical, spiritual, and intellectual well being of the ☐. Members will not be required to perform any other work if it interferes with their duties.

(2) Any mutual assistance organization set up by the ☐ will be under the jurisdiction of the Internee Committee.

(3) Internee Committee members will be provided with the necessary materials, facilities, and transportation and will be given the freedom required to accomplish their duties. Additional special duties performed by members of an Internee Committee include the following:

(a) Visits to outside labor details.

(b) Checking the management of the canteen and the canteen fund.

(c) The presentation and transmittal of petitions and complaints to the appropriate authorities.

(d) The distribution and disposition of collective relief shipments.

(e) Keeping informed of ongoing and final judicial proceedings instituted against a ☐ whom they represent.

(f) The delivery of perishable goods to the infirmary when addressed to a ☐ undergoing disciplinary punishment.

(g) Representing the interest of the ☐ by ensuring the transport of their community property and luggage that they are unable to take with them on transfers because of baggage weight limitations.

(4) Members of Internee Committees who are transferred will be allowed a reasonable time to acquaint their successors with their duties and related current ☐ affairs.

f. Communications facilities. Members of the Internee Committee will be accorded postal and telegraphic facilities for communicating with the protecting powers, International Committee of the Red Cross and its delegates, or other relief and aid organizations authorized to assist the ☐ and U.S. military authorities. Committee members of branch internment camps will be accorded similar facilities for communicating with the Internee Committee of the parent ☐ camp. These communications will be unlimited and will not be considered as forming a part of the correspondence quota outlined in paragraph 6-8.

6–5. Supplies

a. General.

(1) The ☐ must provide their own clothing and footwear. Approved items of clothing and equipment, general supplies, automotive, and fuel will be supplied upon requisition.

(2) Except for work clothing or as circumstances warrant, or climatic conditions required, no replacement clothing will be issued.

(3) Except for hats and other accessories any item of clothing that may be worn as outer garments will be marked as prescribed below:

(a) All shirts, undershirts, blouses, jackets, coats including overcoats and raincoats, and similar articles will be marked with the letters "☐" across the back and on the front of each sleeve between the elbow and shoulder. The letters will be black and 4 inches high. If the clothing or uniforms are of such color that black letters do not contrast well, white will be used.

(b) Trousers, walking shorts, and like items of clothing will be similarly marked with the same letters across the back just below the belt and on the front of both legs just above the knees.

(c) At the discretion of the camp commander, the ISN or other identification marks may be written or stamped on the inside of all ☐ clothing.

b. Food.

(1) Subsistence for the ☐ will be issued on the basis of a master ☐ menu prepared by the theater commander. Preparation of the menu will include the following:

(a) The daily individual food ration will be sufficient in quantity, quality, and variety to maintain the ☐ in good health and to prevent nutritional deficiencies.

(b) The customary diet of the ☐ will be considered.

(c) The ☐ performing physical labor will receive additional food in proportion to the kind of labor performed.

(d) Expectant and nursing mothers and children under 15 years of age will receive additional food in proportion to their physiological needs.

(2) Facilities will be available to the ☐ for preparing additional food received or procured by them from authorized sources.

c. Miscellaneous.

(1) The issuance of expendable supplies is authorized according to allowances prescribed in Army publications.

(2) Equipment required to support vocational training projects such as gardening, carpentry, cobbling, blacksmithing, masonry, repairing shoes and clothing, tailoring, barbering, printing, and farming may be requisitioned through normal supply channels. Subject to restrictions imposed on authorized expenditures from the camp Civilian Internee Fund, camp commanders may purchase locally items of equipment, materials, and supplies needed in the vocational training program that are not available through supply channels.

00000114

00000115

6–6. Medical Care and Sanitation

a General.

(1) Dental, surgical, and medical treatment will be furnished free to the CI.

(2) A medical officer will examine each CI upon arrival at a camp and monthly thereafter. The CI will not be admitted into the general population until medical fitness is determined. These examinations will detect various infestations and communicable diseases especially tuberculosis, malaria, and venereal diseases. They will also determine the state of health, nutrition, and cleanliness of each CI. During these examinations, each CI will be weighed, and the weight will be recorded on DA Form 2664-R.

(3) Each CI will be immunized or reimmunized as prescribed by theater policy.

b CI medical personnel.

(1) Qualified CI medical personnel will be used as much as possible in medical and hygiene work necessary for the well-being of all CI.

(2) Required Army medical personnel will be provided within the capability of the theater commander.

c. Medical facilities. Each CI camp will provide personnel, material, and facilities for adequate routine and emergency dispensary treatment. Persons requiring hospital treatment will be moved, if feasible, to a civilian hospital. The treatment must be as good as that provided for the general population. When civilian hospital facilities are not available or their use is not feasible due to security considerations, U.S. military hospital facilities may be used. Guards for hospitalized CI will be provided, as necessary.

d. Medical care.

(1) Medical and dental care, including dentures, spectacles, and other required artificial appliances, will be provided the CI in accordance with AR 40-3.

(2) Each CI will be given an initial radioscopic chest examination. If active disease is found, pulmonary disease consultation is indicated. If no active disease is found, the individual will be followed through routine periodic examinations.

(3) For children up to 14 years of age, a tuberculin skin test (TST) will be administered. No chest x-ray is necessary if the TST is negative. The local medical officer will establish guidance for subsequent tests based on the tuberculosis experience of the population. Routine annual tuberculin testing of children is not warranted unless there is clear-cut evidence of high risk. (See AR 40-26, para 8–1.)

(4) Experimental research will not be conducted on the CI even if the CI agrees to it.

(5) Sick call for the CI desiring medical attention will be held each day. Emergency treatment will be provided at all times.

e Blood donations. At each CI camp and hospital, a list will be maintained according to blood types of CI who have volunteered to furnish blood.

f. Records and reports.

(1) General. The medical records and forms used for the hospitalization and treatment of U.S. Army personnel and for EPWs will be used for CI. The letters "CI" will be stamped at the top of the form. Medical and dental records will accompany the CI when they are transferred.

(2) Certificate of Wars Incurred Injury or Disability. If a CI is injured while working or incurs a disability that may be attributed to work, a DA Form 2675-R will be completed.

(3) Certificate of medical treatment. Each CI who has undergone medical treatment will be given or request an official certificate indicating the nature of his or her illness or injury, and the duration and kind of treatment given. A duplicate of this certificate will be forwarded to the Branch PWIC.

(4) Seriously ill report. When a CI is seriously ill because of injury or disease, the camp or hospital commander will notify the Branch PWIC without delay and provide a brief diagnosis of the case. Follow-up reports, including notification of removal from the seriously ill list, will be submitted each week thereafter during the period the CI remains critical.

g. Sanitation.

(1) Hygiene and sanitation measures will conform to those prescribed in AR 40-5 and related regulations. Camp commanders will conduct periodic and detailed sanitary inspections.

(2) A detailed sanitary order meeting the specific needs of each CI camp or branch camp will be published by the CI camp commander. Copies will be reproduced in a language that the CI understands and will be posted in each compound.

(3) Each CI will be provided with sanitary supplies, service, and facilities necessary for their personal cleanliness and sanitation. Separate sanitary facilities will be provided for each sex.

(4) All CI will have at their disposal, day and night, latrine facilities conforming to sanitary rules of the Army.

6–7. Social, Intellectual, and Religious activities

a General.

(1) Subject to security connections and camp discipline, the CI will be encouraged, but not required, to participate in social, intellectual, religious, and recreational activities. Introducing political overtones into or furthering enemy propaganda objectives through these activities will not be tolerated.

(2) Premises and facilities for conducting the activities in (1) above will be made available in each camp, if possible. Required materials and supplies will be requisitioned through normal supply channels.

(3) Carefully selected and qualified civilian nationals and CI may be used for the conducting of activities in (1) above where practical as long as they are closely supervised by U.S. Military personnel.

b Visits.

(1) Official. Duly accredited representatives of the protecting powers and of the International Committee of the Red Cross and other will be permitted to visit and inspect CI camps and other places of internment in the discharge of their official duties. The inspections will be at times previously authorized by the theater commander. Such visits will not be prohibited, nor will their duration and frequency be restricted, except for reasons of imperative military necessity, and then only as a temporary measure. These representatives will be permitted to—

(a) Interview the CI without witnesses, if requested.

(b) Distribute relief supplies and approved materials intended for educational, recreational, or religious purposes, or for assisting the CI in organizing their leisure time within the places of internment. Visiting representatives may not accept from the CI any letters, papers, documents, or articles for delivery.

(2) Social. Near relatives and other persons authorized by the theater commander will be permitted to visit the CI as frequently as possible in accordance with theater regulations. They should be advised that the taking of photographs on or about the facility is prohibited.

(3) Emergency visits by civilian internees. Subject to theater policy, the CI may visit their homes in urgent cases, particularly in cases of death or serious illness of close relatives.

c Education.

(1) The CI education program, as developed for each CI camp, will reflect consideration of the following.

(a) The several educational levels represented in the CI population of the camp.

(b) The establishment of basic courses of instruction to include elementary level reading, writing, geography, mathematics, language, music, art, history, and literature.

(c) The uninterrupted education of dependents residing with their CI parents. This education will reflect to the extent determined feasible by the theater commander, the educational curriculums of the particular country.

(d) The development of vocational training projects with an immediate view of developing skills that may be useful during internment and a longer range view of enabling the CI to learn a useful trade or which they may engage when returned to normal civilian life. Such projects may include, e. the discretion of the theater commander, carpentry, furnishing, masonry, repairing shoes and clothing, tailoring, barbering, potting, and farming.

00000116

(2) Equipment required to support the education program will be requisitioned through normal supply channels. At the discretion of the camp commander, items not in supply may be purchased locally and paid for from the camp Civilian Internee Fund provided the items will benefit most CI. The CI personnel employed in the education program will be paid the established rate of pay from the camp Civilian Internee Fund.

d Religion.

(1) CI will enjoy freedom of religion, including attendance at services of their respective faiths held within the internment camps. Wines used for religious purposes will be permitted.

(2) CI who are clergy may minister freely to CI who voluntarily request their ministration. Equitable allocation of CI clergy will be effected among the various camps.

(3) If there is a shortage of CI clergy and the circumstances warrant, the camp commander will provide the CI clergy with the necessary means of transport for visiting the CI in branch camps and hospitals.

(4) The CI clergy will be permitted to correspond on religious matters with the religious authorities in the country of detention and, as far as possible, with the international religious organizations of their faiths. This correspondence will not be considered as forming a part of the quota that may be established in accordance with paragraph 6–8, but will be subject to censorship.

(5) Ordained clergy or a theological student who are not CI may be authorized to enter a camp and conduct religious services. Visits by such personnel will be in accordance with procedures prescribed by the theater commander.

e Recreation.

(1) Recreational activities and facilities, in addition to sports and outdoor games, may include concerts and plays put on by the CI, recorded music, selected motion pictures, and other activities provided by the theater commander.

(2) Special playgrounds will be reserved for dependent children of the CI.

(3) Expenditures from the camp Civilian Internee Fund for the purchase or rental of recreational equipment are authorized.

(4) Appointed delegates of the International Committee of Red Cross are authorized to assist in developing recreational and welfare activities.

6–8. Procedures for communications

a Restrictions on numbers and addresses. Procedures for CI correspondence will be in accordance paragraph 3-5. a-f except that DA Forms 2668-R and 2680-R (Civilian Internee PostCard) will be substituted for DA Forms 2667-R and 2679-R (Civilian Internee Letter) respectively. No restriction will be placed on persons with whom the CI may correspond. DA Form 2679-R will be reproduced on 8 1/2-by 11-inch paper, head to head. DA Form 2680-R will be reproduced on 4-by 6-inch card, head to foot. Copies for local reproduction are located at the back of this regulation. These forms are for the use of Army only.

b Outgoing mail. The following procedures apply to outgoing mail.

(1) Letters and cards will be typed or written legibly in ink. Block printing may be used.

(2) Correspondence will be addressed as follows:

(a) Names and addresses will be complete; they will be placed in the spaces designated on the correspondence forms.

(b) The return address will be in block print to include the full name, grade, ISN, place and date of birth of the sender, and the name of the camp to which assigned. Instructions for including the APO number or the country in which the camp is located should be issued by local directives.

(c) A person at a branch camp will give the parent camp as the return address. The person will be retained on the rosters and postal records of the parent camp.

(d) The surnames in the address and return address of letters and cards will be underlined.

(3) Each person will be required to date his or her letters and cards. The name of the month will be written, not shown by a number.

(4) To expedite the handling of mail, CIs will designate the language of their communication.

(5) The date will not be crossed off, written over, or otherwise modified.

(6) Letters and cards will not be numbered consecutively.

(7) The entire letter or card will be written by the same person. If necessary, the address may be written by someone else.

(8) The CI may not write letters for others who are able to do so themselves. A person may be unable to write because of lack of education, accident, or sickness. If so, the camp commander may permit another person to write the message. In these cases, the person doing the writing will countersign the message.

(9) Letters and cards with parts excised, deleted, or otherwise mutilated before being dispatched from the camp will be returned to the person for rewriting.

c. Correspondence sent to civilian internees. Instructions on letters and cards that are sent to CI should be communicated by CI to their correspondents.

(1) The name and return address of the sender will be typewritten or hand printed. For letters, the sender's name and address will always appear on the backs of the envelope. The addressee's surname will be underlined.

(2) The name, grade, ISN of the detainee, the name or number of the base camp, and the geographical designation or APO number will be placed in the center lower half of the envelope card. These items are specified by local directives or the camp commander. The entire name of the detainee will be in block print. The address will be placed as near the lower edge of the envelope as possible; the postmark at the top will not be obscured or obliterated.

(3) The term "Civilian Internee Mail" will be placed in the upper left corner on the address side. In the upper right corner the words "Postage Free" must be shown.

d. Legal documents. Legal documents, such as wills and deeds, may be enclosed with outgoing correspondence. When it is necessary for a CI to send a legal document, the document and forwarding letter or card may be enclosed in a plain envelope.

e Maps, sketches, or drawings. The CI will not send maps, sketches, or drawings in outgoing correspondence.

f. Registered certified, insured, COD, or airmail items. Individuals will not be permitted to mail registered, certified, insured, COD, or airmail items. If registered, certified, insured, or COD mail of either domestic or foreign origin addressed to a detainee is received, it will be refused. The local post office will return them to the sender.

g. Postage. Letters and cards to and from the CI will be sent by ordinary mail and postage free.

h. Security. Outgoing letters and cards will be secured by using locked boxes or similar means. Only authorized U.S. personnel will handle outgoing mail. Incoming mail may be sorted by the CI when supervised by U.S. personnel.

i. Censorship. Censorship of the CI mail will be according to policies established by the theater commander.

(1) Outgoing letters and cards may be examined and read by the camp commander. The camp commander will return outgoing correspondence containing obvious deviations from regulations for rewriting.

(2) Camp commanders will name U.S. military personnel to supervise the opening of all mail pouches containing incoming letters and cards for CI. These items will be carefully examined by the named personnel before delivery to detainees. Those items that arrive without having been censored by appropriate censorship elements will be returned for censorship to the designated censorship elements.

(3) The CI complaints concerning mail delivery will not be directed to censorship elements. These will be directed to—

(a) The camp authorities.

(b) The responsible major Army commander.

(c) HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400.

00000117

(d) The protecting power.

j. Procedures for parcels.

(1) A person may receive individual parcels and collective shipments containing—

(a) Foodstuffs.

(b) Clothing.

(c) Medical supplies.

(d) Articles of religious, educational, or recreational nature.

(2) Books, included in parcels of clothing and foodstuffs, may be confiscated as the camp commander decides.

(3) The CI may send parcels subject to such restrictions as may be deemed necessary by the theater commander with respect to quotas, contents, size, and weight. The CI may send parcels free of charge up to a weight of 5 kilograms per package, or 10 kilograms in the case of articles that cannot be separated (Art 39, Universal Postal Convention).

(4) Parcels received for transferred persons will be forwarded immediately to them.

(5) Nonperishable articles received for persons who have died, escaped, or been released will be forwarded to the Branch PWIC. Perishable items received for deceased or escaped persons will be released to the Internee Committee who will deliver them to the camp infirmary or hospital for the benefit of the CI.

(6) The contents of all incoming parcels will be examined at the camp by a U.S. officer in the presence of the addressee or the named representative. When considered necessary, the camp commander may request that the parcel be examined by the censorship element. The articles in each parcel will be removed. The string, the inner wrappings, the outer container, and any extraneous items found in the parcel will not be turned over to the CI or the named representatives. Examination will be close enough to reveal concealed articles and messages; however, undue destruction of contents of parcels will be avoided.

k. Telegrams and telephone calls. The CI may read and receive telegrams. They may not make or receive telephone calls.

(1) Dispatching telegrams will be as follows:

(a) A CI who has not received mail from next-of-kin for 3 months may send a telegram not earlier than one month from the date a previous telegram was sent.

(b) CI who are unable to receive mail from their next-of-kin or send mail to them by ordinary postal routes or who are a great distance from their home will be permitted to send one telegram a month.

(c) The CI who is seriously ill or who has received news of serious illness or death in the family will be permitted to send a telegram. The camp commander will authorize the sending of additional telegrams.

(2) The sending of telegrams as provided for in (1) above will be governed by the following:

(a) The message proper will consist of not more than 15 words.

(b) The cost of sending the telegram will be charged to the personal account of the CI.

(c) Arrangements for messages going to or through enemy-occupied countries will be made with the local International Committee of the Red Cross field director and will be sent through the International Committee of Red Cross, Geneva, Switzerland.

(d) Telegrams will be in the English.

(e) No telegram, except by members of the Internee Committee, will be sent to a Government official or to a protecting power.

(f) Telegrams will be censored according to instructions issued by the chief censor.

l. Books. The CI may receive books. Persons or organizations may donate new or unmarked used books, singly or in collections, to camp libraries. Books that arrive at camps uncensored will be censored by a representative of the censorship element. Publications (books, magazines, newspapers, and so forth) containing maps may be made available to the CI upon approval by the camp commander, provided they do not contain maps of the territory surrounding the camps.

m. Newspapers and magazines. The following may be made available to the CI:

(1) Current newspapers and magazines published in English in the United States and selected by the camp commanders.

(2) Unmarked, unused magazines in English published in the United States and distributed by approved relief or aid organizations received at the discretion of the camp commanders for camp libraries after censorship by the censorship element.

(3) Foreign language newspapers and magazines published in the United States, upon approval of the camp commander and after censorship of individual issues by the censorship element.

(4) Newspapers and magazines published outside the United States, regardless of language, must be approved by the theater commander or HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400.

6–9. Complaints and requests to camp commanders and protecting power

a. Persons may make complaints or requests to the camp commander, who will try to resolve the complaints and answer the requests. If the CI are not satisfied with the way the commander handles a complaint or request, they may submit it in writing, through channels, to HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400.

b. Persons exercising the right to complain to the protecting power about their treatment and camp may do so—

(1) By mail.

(2) In person to the visiting representatives of the protecting power.

(3) Through their Internee Committee.

c. Written complaints to the protecting power will be forwarded promptly through HQDA (DAMO-ODL)NPWIC, WASH DC 20310-0400. A separate letter with the comments of the camp commander will be included. Military endorsements will not be placed on any CI communications.

d. If a protecting power communicates with a CI camp commander about any matter requiring an answer, the communication and commander=s reply will be forwarded to HQDA (DAMO-ODL) NPWIC, WASH DC 20310-0400, for proper action.

e. Any act or allegation of inhumane treatment or other violations of this regulation will be reported to HQDA (DAMO-ODL), WASH DC 20310-0400 as a Serious Incident Report. Reporting instructions in AR 190-40 will be used.

6–10. Discipline and security

Measures needed to maintain discipline and security will be set up in each camp and rigidly enforced. Offensive acts against discipline will be dealt with promptly. The camp commander will record disciplinary punishments. The record will be open to inspection by the protecting power.

a. Prohibited acts.

(1) Associations on close terms between the CI and U.S. military or civilian personnel.

(2) Exchange of gifts between the CI and U.S. military or civilian personnel.

(3) Setting up of courts by the CI. The CI will not have any disciplinary power or administer any punishment.

b. Regulations, orders, and notices. Regulations, orders, and notices on the conduct and activities of the CI will be written in a language the CI can understand. They will be posted in a place within each camp where the CI may read them. They will also be made available to persons who do not have access to posted copies. Additional copies will be given to the Internee Committee. This requirement will also apply to the text of the GC and texts of special agreements concluded under it. Every order and command addressed personally to the CI must be given in a language he or she understands. To protect persons from acts of violence, bodily injury, and threats of reprisals at the hand of fellow internees, a copy of a notice in the internee's language will be posted in every compound.

00000118

NOTICE

The CI regardless of faith or political belief, who fear that their lives are in danger or that they may suffer physical injury at the hands of other detainees will immediately report the fact personally to any U.S. Army officer of the camp without consulting the Internee Committee. From that time on, the camp command will assure adequate protection to such civilian internees by segregation, transfer, or other means. Civilian internees who mistreat fellow internees will be punished.

Signed (Commanding Officer)

c. Courtesies. The normal civilian courtesies will be required of the CI in their relationships with military personnel. U.S. military personnel will be courteous and will extend to the CI the regard due them.

d. Flags and political emblems. Flags on which a political energy emblem or device appears will be seized. The CI will not have any political emblem, insignia, flag, or picture of political leaders. The CI may have pictures of political leaders that appear in magazines, books, and newspapers if the pictures are not removed.

e. Security. All security matters connected with the custody and utilization of the CI are the responsibilities of the theater commanders in overseas areas.

6–11. Provisions common to disciplinary and judicial punishments

a. General.

(1) If general laws, regulations, or orders declare acts committed by the CI to be punishable, whereas the same acts are not punishable when committed by persons who are not interned, these acts will only entail disciplinary punishment.

(2) When possible disciplinary punishment rather than judicial punishment will be used.

(3) The courts or authorities in passing sentence or awarding disciplinary punishment will consider the fact that the defendant is not a national of the United States. They will be free to reduce the penalty prescribed for the offense with which the CI is charged and will not be obliged to apply the prescribed minimum sentence but may impose a lesser one.

(4) Punishment will not be inhumane, brutal, or dangerous to the health of the CI. The age, sex, and state of health of the CI will be considered.

(5) Imprisonment in premises without daylight is prohibited.

(6) The length of time a CI is confined while awaiting a disciplinary hearing or a trial will be deducted from any disciplinary or judicial punishment involving confinement to which he or she may be sentenced and will be taken into account in finding any penalty.

(7) No CI may be punished more than once for the same offense.

(8) The CI who has served disciplinary punishment on judicial sentences will not be treated differently from other CI.

b. Confinement benefits. The CI undergoing confinement, whether before or after trial and whether in connection with disciplinary or judicial proceedings, will—

(1) Be allowed to exercise and stay in the open air at least two hours daily.

(2) Be allowed to attend daily sick call, receive medical attention as needed, and if necessary be transferred to a hospital.

(3) Be given enough food to maintain them in as good health as that provided other CI.

(4) Be permitted to confer with visiting representatives of the protecting power or the ICRC.

(5) Be permitted to receive spiritual assistance.

(6) If a minor, be treated with proper regard.

(7) Be provided with hygienic living conditions.

(8) Be provided adequate bedding and supplies and facilities necessary for personal cleanliness.

(9) If a female, be confined in separate quarters from male CI and will be under the immediate supervision of women.

6–12. Disciplinary proceedings and punishments

a. Authority to order disciplinary punishment. Without prejudice to the competence of courts and higher authorities, disciplinary punishment may be ordered only by the camp commander.

b. Rights of accused prior to imposition of disciplinary punishment. Prior to imposition of disciplinary punishment, the CI will be—

(1) Provided precise information regarding the offense of which they are accused.

(2) Given an opportunity to defend the allegation.

(3) Permitted to call witnesses and to have, if necessary, the service of a qualified interpreter.

c. Authorized disciplinary punishment. The following disciplinary punishments are authorized:

(1) Discontinuance of privileges granted over and above the treatment provided for by this regulation.

(2) Confinement.

(3) A fine not to exceed one-half of the wages that the CI may receive during a period of not more than 30 days.

(4) Extra fatigue duties, not exceeding 2 hours daily, in connection with maintaining the internment camp.

d. Duration of disciplinary punishment.

(1) The duration of any single disciplinary punishment will not exceed 30 consecutive days. The maximum of 30 days will not be exceeded even if the CI is answerable for several breaches of discipline, whether related or not, at the time when punishment is imposed.

(2) The period elapsing between the pronouncing of the disciplinary punishment and the completion of its execution will not exceed 30 days.

(3) After imposition of disciplinary punishment on the CI, further discipline will not be imposed on the same CI until at least 3 days have elapsed between the execution of any two of the punishments if the duration on one of the two punishments is 10 days or more.

e. Escape and connected offenses.

(1) The CI who are recaptured after having escaped or when attempting to escape will be liable to disciplinary punishment with respect to this act only, even if it is a repeated offense.

(2) The CI punished as a result of escape or attempt to escape may be subjected to special surveillance that does not affect the state of their health, when the punishment is exercised in a CI camp and if it does not violate any of the provisions of this regulation.

(3) The CI who aid and abet an escape or an attempt to escape, if no injury is done to a person, will be liable to disciplinary punishment only.

(4) Escape, or attempt to escape, even if it is a repeated offense, will not be deemed an aggravating circumstance in cases where the CI is prosecuted for offenses committed incidental to or during his or her escape or attempt to escape.

(5) The CI is liable to prosecution for an escape or attempted escape that results in a death or serious bodily injury to another person.

f. Confinement pending hearing.

(1) The CI accused of an offense for which disciplinary punishment is contemplated will not be confined pending a disciplinary hearing unless it is essential to the interest of camp order and discipline. Its duration will in any case be deducted from any sentence of confinement.

(2) Any period spent by the CI in confinement awaiting a hearing will be reduced to an absolute minimum. For offenses entailing disciplinary punishment only, it will not exceed 14 days.

g. Confinement facilities. CI confined as disciplinary punishment will undergo their punishment in a CI camp stockade.

h. Confinement benefits. In addition to the benefits provided by paragraph 6-11 *b* of this regulation, the CI placed in confinement in connection with disciplinary proceedings will be allowed to send and receive letters, cards, and telegrams in accordance with the

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provisions of this chapter. Parcels and remittances of money, however, may be withheld from the CI until the completion of the punishment. Parcels will be released to the safekeeping of the Internee Committee. If perishable goods are contained in the parcels, the Internee Committee will give them to the infirmary or hospital.

6–13. Judicial proceedings

a. General principles.

(1) The penal laws of the occupied territory will remain in force, with the exception that they may be repealed or suspended by the United States in cases where they constitute a threat to its security or an obstacle to the application of the GC.

(2) The United States may subject the population of the occupied territory to provisions that are essential to enable it to fulfill its obligation under the GC, to maintain orderly government of the territory, and to ensure the security of the U.S. Armed Forces.

(3) The penal provisions enacted by the United States will not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of penal provisions will not be retroactive.

(4) The CI may be tried by general court-martial that must sit within the occupied territory. The CI will not be tried before summary or special court-martial.

(5) No CI will be tried or sentenced for an act that was not forbidden by U.S. law or by international law in force at the time the act was committed.

(6) No protected person may be punished for an offense he or she has not personally committed.

(7) No moral or physical coercion will be exerted to induce the CI to admit guilt for any act.

(8) No CI will be convicted without having had the chance to present a defense with the assistance of a qualified advocate or counsel.

b. Notification of judicial procedures.

(1) The accused will be promptly notified, in writing in a language they understand, of the charges against them and will be tried as rapidly as possible.

(2) A notice (in duplicate) of proceedings against the CI will be submitted through channels to HQDA (DAMO-ODL) NPWIC, WASH DC 20310-0400 for transmittal to the protecting power, in cases of charges involving the death penalty or imprisonment for 2 years or more. Upon request, the protecting power will be furnished with information regarding the status of such proceedings. Furthermore, the protecting power will be entitled, on request, to be furnished with all particulars of any other proceedings instituted against the CI.

(3) The above notice will be sent without delay. The trial will not commence until 3 weeks after the protecting power has been notified.

(4) The notice will include the following:

(a) Surname and first names, internment serial number, date of birth, and profession, trade, or prior civil capacity of the CI.

(b) Place of internment.

(c) Specification of the charges with penal provisions under which they are brought.

(d) Designation of the court that will hear the case.

(e) Place and date of the first hearing.

(5) The Internee Committee will be informed of all judicial proceedings against the CI that it represents and of the results of the proceedings.

(6) The records of trials will be kept by the courts and will be open to inspection by the representatives of the protecting power.

c. Rights and means of defense.

(1) In each trial by court-martial, the accused will be entitled to assistance by a qualified advocate or counsel of his or her own choice, the calling of witnesses, and if necessary the services of a competent interpreter. The CI will be advised of these rights by the commander concerned in due time before the trial.

(2) When the accused does not exercise the right to choose an advocate or counsel, notice to that effect will be sent through HQDA, ODCSOPS(DAMO-ODL), NPWIC, WASH DC 20310-0400, to the protecting power. The protecting power may provide a counsel.

(3) When the protecting power is not functioning and the accused is faced with a serious charge, the convening authority will provide, subject to consent of the accused, an advocate or counsel.

(4) Unless the CI freely waives such assistance, an accused will be provided with the assistance of an interpreter both during preliminary investigation and during the hearing in court. The CI will have the right to object to the interpreter provided and to ask for a replacement.

(5) The defense counsel will be given at least 2 weeks before the opening of the trial and will be granted the necessary facilities to prepare the defense of the accused. The defense counsel will be permitted to visit the accused freely and to interview the accused in private. The defense counsel will also be permitted to confer with any witnesses for the defense including other CI. These privileges will continue until the term of appeal or petition has expired.

(6) Copies of the charge sheet will be given to the accused and the defense counsel in the language that they understand at least 2 weeks before the trial begins.

(7) The interpreter, appointed for and sworn by the court, will provide the official translation of all trial proceedings. The interpreter must not be a trial counsel, defense counsel, assistant to either, or witness; nor should he or she have any bias or interest in the case. The interpreter will translate testimony given in the language of the accused into English for the benefit of the court.

d. Participation of protecting power in criminal proceedings. Representatives of the protecting power will be permitted to attend the trial of any CI unless the hearing has to be held secretly as an exceptional measure in the interest of the security of the United States. If a trial is to be held in secret, a notice as to the reasons, the date, and place of the secret trial will be sent to HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400. They will be notified at least three weeks before the opening of the trial to permit timely notification to the protecting power.

e. Notification of judgment and sentence.

(1) In all cases requiring notification to the protecting power, two copies of the findings, and if applicable the sentence will be forwarded immediately to HQDA, ODCSOPS(DAMO-ODL), NPWIC WASH DC 20310-0400, in the form of a summary communication for transmittal to the protecting power. When NPWIC transmits this information to the protecting power, it will include a brief statement of the appellate rights of the accused. Notification as to the decision of the CI to use or waive his or her right to appeal will also be forwarded (in duplicate) to HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400, for transmittal to the protecting power. If the sentence adjudged is death, the information set forth in *g* below, together with one copy of the court-martial record of trial will be forwarded to HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400, for transmittal to the protecting power.

(2) After final approval of a sentence involving the death penalty or imprisonment for 2 years or more, the following information will be forwarded (in duplicate) to HQDA, ODCSOPS(DAMO-ODL) NPWIC, WASH DC 20310-0400, for transmittal to the protecting power:

(a) A precise wording of the approved finding and sentence.

(b) A summarized report of the evidence.

(c) If applicable, the name of the place where confinement will be served.

f. Appeals in criminal proceedings.

(1) The convicted CI sentenced to confinement or to punishment other than death will have the right of appeal provided for by the laws applied by the court. In all instances, the CI condemned to death will be permitted to petition for pardon or reprieve. The CI will be fully informed of the right to appeal or petition and of the time within which it must be done.

(2) When the laws applied by the court make no provision for appeals, the convicted CI will have the right to petition against the finding and sentence to the competent authority of the United States.

(3) Any period allowed for appeal in the case of sentences involving the death penalty or imprisonment of 2 years or more will not begin to run until notification of the judgment has been received by the protecting power.

(4) Courts of Appeal, if at all possible, will sit in the occupied territory.

g. Death penalty.

(1) The CI will be informed as soon as possible of all offenses that are punishable by the death sentence under applicable laws. Lists of these offenses will be posted in all camps. Duplicate lists will be given to the Internee Committee.

(2) The death sentence may not be pronounced against the CI who was under 18 years of age at the time of the offense unless the attention of the court has been particularly called to the fact that since the accused is not a national of the United States, he or she is not bound to it by any duty or allegiance.

(3) If the death sentence is pronounced, it will not be executed for at least 6 months from the date when the protecting power received the detailed communication furnished by the United States in regard to trial (*e.* above) except as provided in (4) below.

(4) The 6-month period after suspension of the death sentence ((3) above) may be reduced in an individual case in circumstances of grave emergency involving an organized threat to the security of the United States. However, the protecting power must always be notified by HQDA (DAMO-ODL) as to the exception to the 6-month waiting period.

h. Civil proceedings. In every case where the CI is a party to any civil litigation, the camp commander will if the CI so requests inform the court of his or her detention. The camp commander will, within legal limits, take all necessary steps to prevent the CI from being in any way prejudiced by reason of his or her internment regarding the preparation and conduct of the case or execution of any judgment of the court.

i. Confinement pending trial. A pretrial investigation of an offense alleged to have been committed by the CI will be conducted rapidly so that the trial will take place as soon as possible. The CI will not be confined while awaiting trial unless a civilian national of the occupied territory would be so confined if accused of a similar offense. The CI may be confined if it is essential to do so in the interest of camp or national security. However, this confinement will never exceed 3 months.

j. Confinement facilities. CI confined as judicial punishment will serve their sentences in an internment facility, assigned by the theater commander, in the occupied territory as long as U.S. authorities can guarantee their protection.

k. Confinement benefits. In addition to the benefits stated in paragraph 6-11*b*, the CI placed in confinement in connection with judicial proceedings will be permitted to receive one relief parcel each month.

6–14. Death and burial

a. Reference. For general procedures and authorized expenses for the care and disposition of remains, see AR 638-30 and AR 638-40.

b. Disposition of wills. When a person has chosen to make a will, the original and two certified copies will be forwarded to the Branch PWIC upon death or at the CI's request.

c. Information furnished to camp or hospital commander upon death. When the CI in U.S. custody dies, the attending medical officer will promptly furnish the following to the camp (or hospital) commander, the local provost marshal, or other officers who were charged with the custody of the CI prior to his or her death.

(1) Full name.

(2) ISN.

(3) Date, place, and cause of death.

(4) Statement that in his or her opinion death was, or was not, the result of the CI's own misconduct.

(5) When the cause of death is undetermined, the medical officer will make a statement to that effect.

(6) When the cause of death is finally determined, a supplemental report will be made.

d. Notifying the Branch PWIC of a death. The camp or hospital commander or other officer charged with custody of the CI prior to his or her death will notify the local Branch PWIC immediately by telegram of the death. Notification will include all data required in *c* above. The use of supplemental reports is authorized until requirements have been met.

e. Certificate of Death. A copy of DA Form 2669-R is contained in this regulation. For each death, the attending medical officer and the responsible camp commander will complete a DA Form 2669-R. The form will be made out in enough copies to provide the distribution below.

(1) Original—NPWIC.

(2) Copy—Branch PWIC.

(3) Copy—The Surgeon General.

(4) Copy—CI's Personnel File.

(5) If the CI dies in the United States, a copy will be sent to the proper civil authorities responsible for recording deaths in that State.

f. Investigating officer's report.

(1) The camp or hospital commander will appoint an officer to investigate and report the following:

(a) Each death or serious injury caused, or suspected to have been caused, by guards or sentries, another CI, or any other person.

(b) Each suicide or death resulting from unnatural or unknown causes.

(2) The precepts outlined in OC 1949, part IV, section 3, will be used as a guide. (See DA Pam 27-1.)

(3) Military police investigators may be used at the discretion of the camp commander.

g. Burial, record of interment, and cremation.

(1) The deceased CI will be buried honorably in a cemetery set up for them according to AR 638-30 and if possible, according to the rites of their religion. Unless unavoidable circumstances require the use of collective (group or mass) graves, the CI will be buried in a separate grave.

(2) Graves Registration Services will record information on burials and graves. A copy of DD Form 551 (Record of Interment) will be forwarded to the Branch PWIC. The United States will care for graves and record of any subsequent moves of the remains.

(3) A body may be cremated only because of imperative hygiene reasons, the CI's religion, or the CI's request for cremation. The reason for cremation of a body will be cited on the death certificate. Ashes will be kept by Graves Registration until proper disposal can be decided according to the instructions of the protecting power.

h. Forwarding deceased person's file. The personnel files of a deceased person with all pertinent records will be forwarded to the Branch PWIC.

6–15. Transfers

a. Authority to transfer. Theater commanders may direct the transfer of the CI, subject to the following conditions:

(1) The CI may not be transferred beyond the borders of the occupied country in which interned except when for material reasons it is impossible to avoid such displacement. The CI thus evacuated will be transferred back to the area from which they were evacuated as soon as hostilities in that area have ceased.

(2) The sick, wounded, or infirmed CI, as well as maternity cases, will not be transferred if the journey would be seriously detrimental to the health of the CI.

(3) If the combat zone draws close to an internment camp, CI may not be transferred unless they can be moved under adequate conditions of safety. However, CI may be moved if they would be exposed to greater risks by remaining than by being transferred.

b. Notification of transfer.

(1) The CI to be transferred will be officially advised of their departure and their new postal address in time for them to pack their luggage and notify their next-of-kin. The Internee Committee members to be transferred will be notified in time to acquaint their successors with their duties and related current affairs.

(2) The Branch PWIC and NPWIC will be notified immediately of any CI transferred.

c. Treatment during transfer.

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00000121

(1) Generally, the CI will be transferred under conditions equal to those used for the transfer of personnel of the U.S. Military in the occupied territory. If, as an exceptional measure, the CI must be transferred on foot, only those who are in a fit state of health may be so transferred. The CI will not be exposed to excessive fatigue during transfer by foot.

(2) The sick, wounded, or infirmed CI as well as maternity cases will be evacuated through U.S. military medical channels and will remain in medical channels until they are certified "fit for normal internment" by competent medical authorities.

(3) Potable water and food sufficient in quantity, quality, and variety to maintain them in good health will be provided to the CI during transfer.

(4) Necessary clothing, adequate shelter, and medical attention will be made available.

(5) Suitable precautions will be taken to prevent CI from escaping and to ensure their safety.

d. Transfer of personal effects and property.

(1) The CI will be permitted to take with them their personal effects and property. The weight of their baggage may be limited if the conditions of transfer so require, but in no case will it be limited to less than 55 pounds per CI. The personal property that the CI are unable to carry will be forwarded separately.

(2) The mail and parcels addressed to CI who have been transferred will be forwarded to them.

(3) Property, such as that used for religious services, or items donated by welfare agencies will be forwarded as community property. These items are not to be considered a part of the 55 pounds of personal effects and property that each CI is authorized to take.

6–16. Release

a. General.

(1) Control and accountability of CI will be maintained until the CI is receipted for by a representative of his or her country of residence or a designated protecting power.

(2) After hostilities cease and subject to the provisions of (3) below, CI will be released as soon as the reasons for their internment are determined by the theater commander to no longer exist.

(3) The CI who are eligible for release but have judicial proceedings pending for offenses not exclusively subject to disciplinary punishment will be detained until the close of the proceedings. At the discretion of the theater commander, the CI may be detained until completion of their penalty. The CI previously sentenced to confinement as judicial punishment may be similarly detained. Lists of the CI held under this guidance will be forwarded to the Branch PWIC and NPWIC for transmittal to the protecting power.

b. Return of impounded personal effects. Upon release, the CI will be given all articles, moneys, or other valuables impounded during internment and will receive in currency the balance of any credit to their accounts. If the theater commander directs that any impounded currency or articles be withheld, the CI will be given a receipt.

c. Cost of transport. The United States will pay the cost of returning the released CI to the places where they were living when interned.

d. Medical fitness. The CI will not be admitted into the general population until their medical fitness is determined.

Chapter 7
Employment and Compensation—Civilian Internees

7–1. General

a. Theater commanders may issue, within their respective commands, implementing instructions governing the employment and compensation of the CI consistent with these regulations. Copies of such instructions will be forwarded promptly to ODCSOPS.

b. The CI will be employed, so far as possible, in work necessary for the construction, administration, management, and maintenance of the CI camps.

c. The CI compensation procedures will be accomplished in accordance with AR 37-1.

7–2. Ability to perform labor

a. The CI will be required to perform any work consistent with their age and physical condition and in accordance with this regulation.

b. The fitness of CI for labor will be determined using the same procedures as those outlined in paragraph 3–4 *b*.

c. The CI under 18 years of age will not be compelled to work.

7–3. Authorized work

a. Compulsory. The CI may be compelled to perform only the following type of work:

(1) Administrative, maintenance, and domestic work in an internment camp.

(2) Duties connected with the protection of the CI against aerial bombardment or other war risks.

(3) Medical duties if they are professionally and technically qualified.

b. Voluntary. Subject to the provisions of paragraph 4–4, and to other restrictions as may be imposed by the theater commander, the CI may volunteer for, but may not be compelled to perform, work of any type without regard to the military character, purpose, or classification of the work. They will be free to terminate such work at any time subject to having labored for 6 weeks and having given an 8-day notice.

7–4. Unauthorized work

The criteria for unauthorized work for CI is the same as those found for EPW/RP in paragraph 4-5.

7–5. Working conditions

The working conditions for the CI, to include protective clothing, equipment, and safety devices, will be at least as favorable as those prescribed for the civilian population of the occupied territory by the national laws and regulations and as provided for in existing practice. In no case will the working conditions for the CI be inferior to those for the civilian population employed in work of the same nature and in the same district.

7–6. Length of workday

a. The length of the working day of the CI will not exceed that permitted for civilians in the locality who are employed in the same general type of work. A rest period of not less than 1 hour will be allowed during the workday.

b. The length of the workday for CI will be in accordance with paragraph 4–8.

7–7. Day of rest

Each CI will be allowed a rest of 24 consecutive hours every week, preferably on Sunday or on the day of rest in his or her country.

7–8. Paid work

The following are types of work for which the CI will be compensated:

a. Services, including domestic tasks, in connection with administering and maintaining CI camps, branch camps, and hospitals when the CI performs these services permanently.

b. Spiritual and medical duties performed by the CI on behalf of their fellow CI.

c. Services as members and as assistants to the members of the Internee Committee. These persons will be paid from the camp Civilian Internee Account. If there is no such account, they will be paid the prescribed rate from U.S. Army appropriated funds.

d. All types of work that the CI does not have to do but does voluntarily.

00000122

7–9. Unpaid work

The criteria for unpaid work for CI is the same as for EPW/RP found in paragraph 4-18.

7–10. Compensation for paid work

The daily compensation that the CI will receive for paid work will be announced by the Department of the Army at an appropriate time subsequent to an outbreak of hostilities. The CI compensation procedures will be in accordance with AR 37-1.

7–11. Disability compensation

Procedures for CI disability compensation will be the same as those found in paragraph 4-20.

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Appendix A
References

Section I
Required Publications

AR 37–1
Army Accounting and Fund Control. (Cited in para 3-3n.)

AR 40–3
Medical, Dental, and Veterinary Care. (Cited in para 6-6d.)

AR 40–5
Preventive Medicine. (Cited in para 6-6g.)

AR 190–40
Serious Incident Report. (Cited in para 3-16f.)

AR 195–2
Criminal Investigation Activities. (Cited in para 1-4h.)

AR 600–8–1
Army Casualty Operation/Assistance/Insurance. (Cited in para 3-10a.)

AR 600–25
Salutes, Honors, and Visits of Courtesy. (Cited in para 3-6c.(4))

AR 600–55
The Army Driver and Operator Standardization Program (Selection, Training,Testing, and Licensing). (Cited in para 4-21)

AR 638–30
Graves Registration Organization and Functions in Support Major Military Operations. (Cited in para 3-10a.)

AR 670–1
Wear and Appearance of Army Uniforms and Insignia. (Cited in para 3-15e.)

AR 735–5
Policies and Procedures for Property Accountability. (Cited in para 3-9b.)

FM 22–5
Drill and Ceremonies. (Cited in para 3-6c.(4))

Dictionary of Occupational Titles
(Cited in para 4-13a.)

Manual for Courts–Martial
Manual for Courts-Martial, U.S., 1984. (Cited in para 3-7b.)

Uniform Code of Military Justice
(Cited in para 3-7b.)

DODD 2310.1
DOD Program for Enemy Prisoners of War (EPOW) and Other Detainees. (Cited in para 1-4g.)

DODD 5100.77
DOD Law of War Program. (Cited in para 1-4a.(2))

Section II
Related Publications

A related publication is merely a source of additional information. The user does not have to read it to understand this regulation.

AR 40–66
Medical Record Administration.

AR 40–400
Patient Administration.

AR 55–355
Defense Traffic Management Regulation. (NAVSUPINST 4600.70, AFR 75-2, MCO P4600.14B, DLAR 4500.3

AR 190–14
Carrying of Firearms and Use of Force for Law Enforcement and Security Duties.

AR 190–47
The Army Corrections System

AR 355–15
Management Information Control System

AR 380–5
Department of the Army Information Security Program.

AR 985 series
Army Safety Program.

DA PAM 27–1
Treaties Governing Land Warfare.

FM 33–1
Psychological Operations

AF Handbook (AFH) 31–302
Air Base Defense and Contingency Operations Guidance and Procedures.

SECNAVINST 3461.3
Program for Prisoners of War and Other Detainees.

Section III
Prescribed Forms

DA Form 2662–R
EPW Identity Card. (Prescribed in para 3-3a(2)(b))

DA Form 2663–R
Fingerprint Card. (Prescribed in para 3-3a(2)(c))

DA Form 2664–R
Weight Register. (Prescribed in para 3-4i(3))

DA Form 2665–R
Capture Card for Prisoner of War. (Prescribed in para 3-5d(5))

DA Form 2666–R
Prisoner of War - Notification of Address. (Prescribed in para 3-5d(4))

DA Form 2667–R
Prisoner of War Mail - Letter. (Prescribed in para 3-5d(1))

DA Form 2668–R
Prisoner of War Mail - Post Card. (Prescribed in para 3-5d(1))

DA Form 2669–R
Certificate of Death. (Prescribed in para 3-10e)

DA Form 2670–R
Mixed Medical Commission Certificate for EPW. (Prescribed in para 3-12j)

DA Form 2671–R
Certificate of Direct Repatriation for EPW. (Prescribed in para 3-12k)

00000124

DA Form 2672–R
Classification Questionnaire for Officer Retained Personnel.

DA Form 2673–R
Classification Questionnaire for Enlisted Retained Personnel.

DA Form 2674–R
Enemy Prisoner of War/Civilian Internee Strength Report.

DA Form 2675–R
Certificate of Work Incurred Injury or Disability. (Prescribed in para 6-6f(2))

DA Form 2677–R
Civilian Internee Identity Card. (Prescribed in para 6-2e)

DA Form 2678–R
Civilian Internee Notification of Address. Prescribed in para 6-2f)

DA Form 2679–R
Civilian Internee Mail. (Prescribed in para 6-8a)

DA Form 2680–R
Civilian Internee Post Card. (Prescribed in para 6-8a)

DA Form 4237–R
Detainee Personnel Record. (Prescribed in para 3-3a(2)(b))

DD Form 2745
Enemy Prisoner of War (EPW) Capture Tag. (Prescribed in para 2-1b.)

Section IV
Referenced Forms

DA Form 1132
Prisoners Personal Property List - Personal Deposit Fund

DD Form 551
Record of Internment

DD Form 629
Receipt for Prisoner or Detained Person

Standard Form 88
Report of Medical Examination

Standard Form 600
Chronological Record of Medical Care

DA Form 1132
Prisoners Personal Property List-Personal Deposit Fund

DA Form 3444
Treatment Record

DA Form 4137
Receipt for Evidence/Property Custody Document

Appendix B
Internment Serial Number

The internment serial number (ISN) is a unique identification number assigned to each EPW, RP and CI taken into the custody of the U.S. Armed Forces. Throughout internment/detention, EPW/CI are identified, PWIS accountability for EPW, RP and CI by the U.S. is established when the ISN is assigned. The ISN will consist of three components, with the first two separated by a dash as follows:

a. First Component. The first component will contain five characters. The first two will be the alpha-characters 'US'. The third character will be either the alpha or numeric designation for the command/theater under which the EPW, RP and CI came into the custody of the U.S. The fourth and fifth positions are alpha-characters designating the EPW, RP and CI serving power.

b. Second Component. The second component is a six character numeric identifier. These numbers will be assigned consecutively to all EPW, RP and CI processed through ISN assigning organizations. The Branch PWIC will assign blocks of numbers to ISN assigning organizations/elements in the supported theater.

c. Third Component. The third component will consist of an acronym identifying the classification of the individual: either EPW, RP, or CI, to represent Enemy Prisoner of War, Retained Person, or Civilian Internee, respectively. Should an individual that was initially classified as an EPW later determined to be a medically or religiously qualified retained person, the classification may be changed to "RP" with the approval of the EPW command/brigade.

d. Example. The first EPW processed by an ISN assigning organization in a theater designated as "9" and whose country was designated as "AB" will be assigned the following ISN: US9AB- 000001-EPW. The tenth such EPW processed by the same command will be assigned the ISN of: US9AB-000010-EPW. If the eleventh individual processed by the same command was an RP and the fifteenth a CI, their ISNs would be: US9AB-000011-RP and US9AB-000015-CI, respectively.

e. EPW transferred to CONUS without having been assigned an ISN and those captured within the Continental U.S., will be processed and assigned an ISN as above, by the CONUS EPW organizations.

00000125

Glossary

Section II
Abbreviations

Section I
Abbreviations

ADP
Automated Data Processing

APO
Army Post Office

Cdr
Commander

CI
Civilian Internee(s)

COD
Cash on Delivery

CONUS
Continental U.S.

CTA
Central Tracing Agency

DA
Department of the Army

DAR
Defense Acquisition Regulation

DCSINT
Deputy Chief of Staff for Intelligence

DCSLOG
Deputy Chief of Staff for Logistics

DCSOPS
Deputy Chief of Staff for Operations and Plans

DCSPER
Deputy Chief of Staff for Personnel

DOD
Department of Defense

DRMO
Defense Revitilization and Marketing Office

EDCSA
Effective Date of Change of Strength Accountability

EPW
Enemy Prisoner(s) of War

FAO
Finance and accounting officer

FBI
Federal Bureau of Investigation

FORSCOM
Forces Command

GC
Geneva Convention Relative to the Protection of Civilian Persons in time of War

GPW
Geneva Convention Relative to the Treatment of Prisoners of War

GWS
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field

GWS SEA
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

HQDA
Headquarters, Department of the Army

HSC
U.S. Army Health Services Command

ICRC
International Committee of the Red Cross

ISN
Internment Serial Number

JCS
Joint Chiefs of Staff

MPMIS
Military Police Management Information Systems

NCO
noncommissioned Officer

OD
Other Detainees

OSD
Office of the Secretary of Defense

NPWIC
National Prisoner of War Information Center

PP
Protected Person

PSYOP
Psychological Operations

PWIC
Prisoner of War Information Center

RP
Retained Personnel

ROK
Republic of Korea

SJA
Staff Judge Advocate

TJAG
The Judge Advocate General

TRADOC
U.S. Army Training and Doctrine Command

TSG
The Surgeon General

TST
Tuberculin Skin Test

UCMJ
Uniform Code of Military Justice

USAFAC
U.S. Army Finance and Accounting Center

USFK
U.S. Armed Forces, Korea

Section II
Terms

Canteen
A facility set up for the sale of authorized services and items of merchandise.

Central Tracing Agency
Centralizes tracing requests concerning all persons reported missing during the conflict. Requests are either forwarded by centralized information bureaus or submitted by families via their respective National Red Cross or Red Crescent Societies. The Central Tracing Agency (CTA) then passes them on for processing to the appropriate authorities and forwards replies to the requesters.

Civilian Internee(s)
A civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power.

Civilian Internee Account
Accounts established and records maintained under control of the disbursing officer. Deposit Fund Account 21X6015.

Civilian Internee Branch Camp
A subsidiary camp under the supervision and administration of a civilian internee camp.

Civilian Internee Camp
An installation established for the internment and administration of civilian internees.

Civilian Internee Compound
A subdivision of a CI enclosure.

Civilian Internee Enclosure
A subdivision of a CI camp.

Contract Employee
Any person, corporation, association, State or municipal government agency, and other employer (except DOD) that contracts for work to be done.

00000126

Dependent Child Internee
A child who on request of the interned parents, for compassionate reasons, is accommodated in a CI internment camp with the interned parents.

Detainee
A term used to refer to any person captured or otherwise detained by an armed force.

Domestic Service
Such normal household duties as preparing and serving food and the care and repair of clothing.

Enemy Prisoner of War
A detained person as defined in Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949. In particular, one who, while engaged in combat under orders of his or her government, is captured by the armed forces of the enemy. As such, he or she is entitled to the combatant's privilege of immunity from the municipal law of the capturing state for warlike acts which do not amount to breaches of the law of armed conflict. For example, a prisoner of war may be, but is not limited to, any person belonging to one of the following categories who has fallen into the power of the enemy: a member of the armed forces, organized militia or volunteer corps; a person who accompanies the armed forces without actually being a member thereof; a member of a merchant marine or civilian aircraft crew not qualifying for more favorable treatment; or individuals who, on the approach of the enemy, spontaneously take up arms to resist invading forces.

Enlisted EPW
Enlisted EPW and civilian EPW entitled to be treated as enlisted EPW.

EPW Branch Camp
A subsidiary camp under supervision and administration of the main EPW camp.

EPW Camp
A camp set up by the U.S. Army for the separate internment and complete administration of EPW.

EPW Compound
A subdivision of an EPW enclosure.

EPW Enclosure
A subdivision of an EPW camp. Internment Serial Number Unique, controlled identification number assigned an EPW upon capture and entry into the Prisoner of War Information System.

Military Nature
Term that applies to those items or those types of construction that are used exclusively by members of the Armed Forces for operational purposes (e.g., arms, helmets). The purposes are in contrast to items or structures that may be used either by civilian or military personnel (e.g., food, boots, buildings, public roads, or railroads).

Military Purpose
Activities intended primarily or exclusively for military operations as contrasted with activities intended primarily or exclusively for other purposes.

Noncommissioned Officer EPW
Enlisted EPW and civilian EPW entitled to be treated as a Noncommissioned Officer EPW.

Other Detainee (OD)
Persons in the custody of the U.S. Armed Forces who have not been classified as an EPW (article 4, GPW), RP (article 33, GPW), or CI (article 78, GC), shall be treated as EPWs until a legal status is ascertained by competent authority.

Personal Effects
Personal effects the EPW may retain include the following:

a. Clothing.

b. Mess equipment (knives and forks excluded).

c. Badges of rank and nationality.

d. Decorations.

e. Identification cards or tags.

f. Religious literature.

g. Articles that are of a personal use or have a sentimental value to the person.

h. Protective mask.

Prisoner of War Information System
A computer information system designed to assist military police in the field, the Branch PWIC and the National PWIC to manage enemy prisoners of war by providing automated support for the policies and procedures established by regulation.

Prisoner of War Information Center (PWIC)
A TOE organization established to collect information pertaining to EPW, RP and CI and to transmit such information to the National Prisoner of War Information Center.

Protected Person
Persons protected by the Geneva Convention who find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Retained Personnel
Enemy personnel who come within any of the categories below are eligible to be classified as retained personnel (RP):

a. Medical personnel who are members of the medical service of their armed forces.

b. Medical personnel exclusively engaged in the—

(1) Search for, collection, transport, or treatment of, the wounded or sick.

(2) Prevention of disease.

(3) Staff administration of medical units and establishments exclusively.

c. Chaplains attached to enemy armed forces.

d. Staff of National Red Cross societies and other voluntary aid societies duly recognized and authorized by their governments. The staffs of such societies must be subject to military laws and regulations.

Section III
Special Abbreviations and Terms
This section contains no entries.

00000127

Index

This index is organized alphabetically by topic and subtopic. Topics and subtopics are identified by paragraph number.

Canteen, 3-4h
Capture, 2-1
Civilian Internee
  Authorization to Intern, 5-1b
  Definition (Glossary Section II
  Personal effects, 6-3
  Treatment, 5-1a(1)
Complaints
  CI, 6-9
  EPW and RP, 3-16,
Correspondence
  Enemy Prisoner of War and Retained Personnel, 3-5
  Civilian Internee, 6-8
Discipline and Security
  CI, 6-10, 6-11
  EPW and RP, 3-6
Death and Burial, 3-10
  Civilian Internee, 6-14
  Burial at sea, 3-10h
Death Penalty
  Civilian Internee, 6-13g
  EPW/RP, 3-8i(1)
DOD Directive 2310.1, 1-4g
Enemy Prisoner of War
  Definition (Glossary-Section II,
  Sick and Wounded, 2-2
  Transfers, 3-11
  Questioning of Prisoners, 2-1a(1)(d)
  Evacuation of Prisoners, 2-2, 2-3,
Escape
  Preventing Escape, 3-6f(2)
Evacuation Policy, 2-3
Executive Agent, 1-4b

Flags, 3-6e
Finance
  Supplemental Pay, 4-14, 4-16

Health and Comfort Packets, 3-4h

International Committee of the Red Cross
Internee Committee, 6-4
Internment Serial Numbers (Appendix B)

Judicial proceedings
  Civilian Internees, 6-13
  EPW/RP, 3-8,

Labor (Civilian Internee
  Authorized work, 7-3
  Unauthorized work, 7-4
  Working conditions, 7-5
  Day of rest, 7-7
Labor (EPW/RP)
  Authorized work, 4-4
  Length of work day, 4-8
  Rest Periods, 4-9
  Task system, 4-12
  Unauthorized work, 4-5

Mail
  Civilian Internee, 6-8b
  EPW/RP, 3-5
Medical
  Civilian Internee Dental Care, 6-6d(1)
  Civilian Internee Medical Care and Sanitation, 6-6

  Medical Personnel, 1-5f
  Mixed Medical Commission, 3-12
Military Police, 1-4g, 6-2

National Prisoner of War Information Center (NPWIC, 1-7
Naval Vessels, 2-1b

Prisoner of War Information Center, 1-8
Property, 3-9

Other Detainee (Glossary Section II)

Parcels, 3-5k
Photographing, 1-5d
Prisoner of War Information Center
  National Prisoner of War Information Center, 1-6
  Branch Prisoner of War Information Center, 1-7
Protection Policy, 1-5
Public Affairs, 1-9

Release
  Civilian Internee, 6-16
Religion, 1-5g
  Civilian Internee, 6-7
  Chaplains, 3-15b(3)
  Enemy Prisoner of War, 1-5g(2)
  Ministers, 3-15d(1)
Repatriation, 3-14)
  Sick and wounded, 3-12)
Retained Personnel, 3-15)
  Definition (Glossary Section II)
  Chaplains, 3-15b(3)
  Medical Personnel, 1-5f

Safety
  Civilian Internee, 3-2
  EPW/RP, 3-17
Saluting, 3-6d
Social, Intellectual and Religious activities, 3-4d
  Civilian Internee, 6-7
  EPW/RP, 3-4d
Spies and Saboteurs, 5-1e

Telegrams
  Civilian Internee, 6-8k
  EPW/RP, 3-5l
Tobacco, 3-4h
Transfers
  CI, 6-15
  EPW and RP, 3-11
Tribunals, 1-6
  Article 5 GPW, 1-6a

00000128

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi, Petitioners, v. DONALD RUMSFELD Secretary of Defense COMMANDER W.R. PAULETTE, Norfolk Naval Brig Respondents.	)	CASE NO. 2:02CV439

PETITONER'S RULE 26 DISCLOSURES

I. Potential Witnesses

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Norfolk Naval Brig
Norfolk, Virginia

John Walker Lindh
Alexandria, Virginia

Esam Fouad Hamdi
P.O. Box 240
Jubail, Saudi Arabia 31951
966-55-903131

II. Documents

None other than those attached to the filings in this case.

00000129

CERTIFICATE OF SERVICE

I certify that on this 22th day of July, 2002, a copy of the foregoing Rule 26 Disclosures was hand-delivered to Lawrence R. Leonard, Managing Assistant United States Attorney, at the Office of the United States Attorney, Eastern District of Virginia, Norfolk Division., World Trade Center, 101 W. Main, Suite 8000, Norfolk, VA 23510.

Geremy C. Kamens
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FRANK DUNHAM, JR.
FEDERAL PUBLIC DEFENDER

July 22, 2002

Lawrence R. Leonard
Managing Assistant United States Attorney
United States Attorney's Office
8000 World Trade Center
101 W. Main Street
Norfolk, Virginia 23510

Re: Yaser Esam Hamdi, et al. v. Donald Rumsfeld, et. al.
Case No. 2:02cv439

Dear Mr Leonard:

Enclosed please find a copy of Petitioner's Rule 26 Disclosures. This information is provided solely for purposes of discovery in this case.

Sincerely,

Geremy C. Kamens
Assistant Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CLERKS OFFICE
2002 JUL 22 A 11:58
NORFOLK, VA.

YASER ESAM HAMDI,

ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. Civil Action No. 2:02cv439

DONALD RUMSFELD, Secretary of Defense,

COMMANDER W.R. PAULETTE, Norfolk Naval Brig,

Respondents.

RESPONDENTS' RULE 26 STATEMENT

Respondents Donald Rumsfeld and Commander W.R. Paulette respond to the Court's Order that they make their Initial Disclosures pursuant to Fed.R.Civ.P. 26(a)(1) as follows:

The Court's Order is without jurisdiction and, in any event, improper. Because the Fourth Circuit has yet to issue its mandate, jurisdiction over this matter remains in the Fourth Circuit, and respondents therefore continue to object to this Court's improper effort to exercise jurisdiction. See United States v. Montgomery, 262 F.3d 233, 239 (4th Cir.), cert. denied, 122 S. Ct. 526 (2001); see also Kusay v. United States, 62 F.3d 192 (7th Cir. 1995). The Fourth Circuit's July 12, 2002 decision in this case deals directly with the appropriate procedures to be followed in this case, especially with respect to any demands that may be placed on respondents before the filing of their response. See Hamdi v. Rumsfeld, 4th Cir. No. 02-6895, slip. op. 14-15.

Furthermore, even apart from the fact that the court of appeals' mandate has not yet issued,

the Court's Order is plainly premature at this point in the proceedings. Respondents' answer to the petition is not due (under this Court's improper July 18 Order) until July 25, four days after the initial disclosure deadline set by the Court. Moreover, the Court has ordered initial disclosures even before it has considered respondents' objection to the appointment of counsel pursuant to 18 U.S.C. 3006A, in accordance with the clear direction of the Fourth Circuit's decision. See Hamdi, slip. op. at 14 n.2. The Court's Order to make initial disclosures in accordance with Rule 26 contradicts the Fourth Circuit's explicit direction to this Court to "consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." Id. at 15.

In any event, Rule 26 specifically exempts from any initial disclosure requirement actions, such as this, involving "a petition for habeas corpus." Fed. R. Civ. P. 26(a)(1)(E)(ii). In addition, as respondents will explain in their return, the habeas petition in this case raises a purely legal question. Moreover, as respondents also will explain in their return, the proper focus of the Court's inquiry is the government's proffered basis for its decision. Because the analysis focuses on the government's stated basis for its decision, there is no occasion for discovery. The same basic principles apply in the Administrative Procedure Act context (when there is much less deferential judicial review than in this type of action), and for that reason Rule 26 does not apply in "an action for review on an administrative record." Fed. R. Civ. P. 26(a)(1)(E)(i). There is, in short, no "discoverable" information pertaining to the resolution of the habeas petition in this case.

Respectfully submitted

Paul J. McNulty
United States Attorney

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Dated: July 22, 2002

00000134

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Respondents' Rule 26 Statement was served, this 22nd day of July, 2002, by fax and by hand delivery addressed to:

Larry W. Shelton
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Managing Assistant United States Attorney

00000135

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FILED
JUL 22 2002
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. CIVIL ACTION NO. 2:02cv439

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

ORDER

Before the Court is the "Respondents' Rule 26 Statement," in which the Respondents refuse to comply with this Court's July 18, 2002, Order, given in open court, requiring them to submit their Rule 26 disclosures by July 22, 2002. The statute under which the Petitioner seeks relief, 28 U.S.C. § 2241 & 2243, sets forth an expedited procedure for people being held without charge to seek judicial review of their confinement. Moreover, Federal Rule of Civil Procedure 26(a)(1)(E)(ii), upon which Respondents rely in not complying with this Court's Order, only exempts "proceeding[s] to challenge a criminal conviction or sentence." The problem at the heart of this case is that the Petitioner is not being confined pursuant to a criminal conviction; he is ostensibly being confined pursuant to executive action which may or may not be appropriate.

Be that as it may, I hope that it was haste rather than a deliberate mis-statement of the law that caused the Assistant United States Attorney to imply that the Petitioner was being held pursuant to a criminal conviction. The United States Attorney is in fact more intelligent than one might imagine from his so-called "Respondents' Rule 26 Statement" in which he totally ignores the Court's admonitions. It is noted that the person who executed this document, Susan Watt, has not appeared in this case, and therefore may not have known and been aware of what was happening. In any event, the Court will be

cautious, as the Fourth Circuit has admonished, and will follow the Court of Appeals for the Fourth Circuit, in its requirements.

In keeping with this spirit of caution, the Court suggests that the United States Attorney either submit the disclosures required by Rule 26, or make a proper motion for relief from Rule 26, by July 24, 2002 at noon. To totally ignore the Court's Order borders on an action which I am sure that Mr. McNulty, Mr. Clement, and Mr. Leonard would not particularly want.

In addition, the United States Attorney must not have read the same Opinion of the Court of Appeals as the undersigned did, and may have some information with which the undersigned is not acquainted. In response to the Respondents' proffer to the Court of Appeals of a "sealed declaration discussing the military's determination to detain petitioner Hamdi as an enemy combatant," the Fourth Circuit noted that "This declaration is factual in nature. As such, it should come first before the district court, not the court of appeals." Hamdi v. Rumsfeld, 2002 WL 1483908, *5 (4th Cir. July 12, 2002). This suggests that this case is not solely a matter of law, but that a factual record of some sort must be developed to understand whether or not the Petitioner is an illegal enemy combatant.

Finally, I would hope that Mr. McNulty, Mr. Clement, and Mr. Leonard would sign their own pleadings, for I would hesitate to call them to task for that which someone else unacquainted with the case may sign. To ignore the Court of Appeals and to ignore this Court is not cautious, but inflammatory, and if that is what they seek to do, they should sign their own pleadings.

The Clerk of the Court is **DIRECTED** to forward copies of both the petition and this Order both by fax and by U.S. mail, to all counsel of record, and specifically to Mr. McNulty, Mr. Clement, Mr. Leonard, and Ms. Watt, to the U.S. Court of Appeals for the Fourth Circuit, and to Yaser Esam Hamdi.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

July 22, 2002

00000138

U.S. Department of Justice

United States Attorney
Eastern District of Virginia

8000 World Trade Center
101 West Main Street
Norfolk, Virginia 23510-1624

Tel 757/441-6331
Fax 757/441-6689

July 24, 2002

Via Hand Delivery

Larry W. Shelton
Supervisory Assistant Federal Public Defender
Geremy C. Kamens
Assistant Federal Public Defender
Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, VA 23510

Re: *Yaser Esam Hamdi, et al. v. Donald Rumsfeld, et al.*
Civil Action 2:02cv439

Dear Mr. Shelton and Mr. Kamens:

Without waiving their objections to the Court's order that they make initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1), respondents make the following disclosures:

Rule 26(a)(1)(A) Individuals:

Michael Mobbs — Declaration
Special Assistant to the Undersecretary
of Defense for Policy
Department of Defense

Rule 26(a)(1)(B) Documents, Data Compilations and Tangible Things:

Declaration of Michael Mobbs

Documents or tangible things submitted in Civil Actions 2:02cv348, 2:02cv382 and 2:02cv439

Al Qaida Training Manual, available at www.usdoj.gov:80/ag/trainingmanual.htm.

00000139

Other documents or tangible things that may be identified or developed during the course of this litigation.

Rule 26(a)(1)(C) Computation of Damages Claimed by Disclosing Party:

Not applicable

Rule 26(a)(1)(D) Insurance Agreements:

Not applicable

Sincerely,

Paul J. McNulty
United States Attorney

By: Susan L. Watford
Lawrence R. Leonard
Managing Assistant United States Attorney

FILED
JUL 31 2002
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. CIVIL ACTION NO. 2:02cv439

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

ORDER

The Court having received all required submissions in this case, it hereby **ORDERS** a hearing to be held on August 8, 2002, at 2:00 p.m., at which time the Court will hear argument on the materials submitted.

Furthermore, the Court **ORDERS** the government to produce the following materials, solely for in camera review by the Court, two days prior to the hearing, by noon on August 6, 2002. All the documents requested by the Court in this Order are to be redacted to protect any intelligence matters not within the scope of this inquiry into Hamdi's legal status.

1) Copies of all Hamdi's statements, and the notes taken from any interviews with Hamdi, that relate to his reasons for going to Afghanistan, his activities while in Afghanistan, or his participation in the military forces of the Taliban or any other organization in that country, appropriately redacted for any intelligence matters;

2) A list of all the interrogators who have questioned Hamdi, including their names and addresses, and the dates of the interviews, unless this information implies intelligence which might aid the enemy, in which event the material must show "name withheld" and dates, but not the addresses, of the unnamed individuals who conducted the interviews;

3) Copies of any statements by members of the Northern Alliance regarding the circumstances of Hamdi's surrender and transfer to forces of the United States, appropriately redacted for any intelligence matters;

4) A list that includes the date of Hamdi's capture, and that gives all the dates and locations of his subsequent detention, appropriate redacted for any intelligence matters;

5) The name and title of the individual within the United States Government who made the determination that Hamdi was an illegal enemy combatant and should be held in the manner in which the government is now holding him. In other words, with whom does the buck stop in this case for each of the matters listed in this question?;

6) The name and title of the individual within the United States Government who made the decision to move Hamdi from Guantanamo Bay, Cuba to the Norfolk Naval Station, and a statement of the reason for this decision.

Pursuant to the decisions of the Court of Appeals in this case, the Court will not allow Hamdi to be interviewed by the appointed lawyer, or to be present at this hearing. Furthermore, to set minds at ease, this Court will proceed with caution and all due deference to the executive branch.

The Clerk of the Court is **DIRECTED** to forward copies of this Order, both by fax and by U.S. mail, to all counsel of record, and to Yaser Esam Hamdi.

IT IS SO ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

July 31, 2002

U. S. Department of Justice

Office of the Solicitor General

Principal Deputy Solicitor General — Washington, D.C. 20530

August 2, 2002

VIA FACSIMILE

Ms. Patricia S. Connor
Clerk
United States Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

Re: Rumsfeld v. Hamdi, No. 02-6895

Dear Ms. Connor:

In connection with Respondents' Emergency Motion for Stay Pending Appeal, filed June 13, 2002, in the above captioned appeal, Respondents submitted the declaration of Colonel Donald D. Woolfolk (a copy of which is attached hereto). In that declaration, Colonel Woolfolk explained the vital role that interrogations of enemy combatants such as Yaser Esam Hamdi play in ensuring the security of this Nation and its citizens, and that Hamdi's background suggested "considerable knowledge of Taliban and al Qaida training and operations" that could make Hamdi "have future value as a source of intelligence." Woolfolk Decl. at 2. Colonel Woolfolk also indicated that, at the time of his declaration, the Department of Defense had "voluntarily chosen to suspend active interrogations of [Hamdi] pending resolution of legal matters." Ibid.

I am writing to inform the Court that the Department of Defense has informed me that, in light of a recent change in circumstances, it has determined to resume interrogations of Hamdi for intelligence purposes. The Department of Defense has also informed me that, in its judgment, these interrogations, which resumed today, are compelled by important national security concerns. Should the Court deem it necessary, Respondents can provide a declaration ex parte and under seal concerning these changed circumstances. However, because the interviews are being conducted solely for intelligence purposes, and are unavailable to counsel for the Respondents, information concerning the interviews themselves could not be included in such a filing. Although we do not believe that this development affects the opinion issued by this Court, we wish to inform the Court so that the record may be clear on this point.

Accordingly, we request that this letter be distributed to the panel in the above-referenced case as soon as possible Thank you for your assistance in this matter

Very truly yours,

Paul D. Clement
Principal Deputy Solicitor General

Enclosure

cc: Hon. Robert G. Doumar
Frank W. Dunham, Jr.

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Declaration of DONALD D. WOOLFOLK

Pursuant to 28 U.S.C. 1746, I, Donald D. Woolfolk, hereby state that, to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

(FOUO) I am a Colonel in the US Army with 30 years Active Federal Commissioned Service. I currently am the Deputy Commander, Joint Task Force (JTF) 170, Guantanamo Bay, Cuba, however, I am serving today as the Acting Commander. As such, I am directly responsible for the successful execution of the JTF 170 mission to fully exploit the intelligence value of terrorist personnel, Taliban, and al Qaida personnel detained worldwide. Currently, there are in excess of 450 detainees being held at the detainee camp at Guantanamo Bay, Cuba.

(U) The security of this nation and its citizens is wholly dependent upon the U.S. Government's ability to gather, analyze, and disseminate timely and effective intelligence. Put simply, intelligence saves lives. Nowhere has this proposition become more apparent than in our nation's current War on Terrorism. Absent a total commitment to intelligence gathering efforts, incidents like those that occurred on September 11th could become tragically common.

(U) The Department of Defense has expended considerable effort to develop effective intelligence techniques, particularly during Operation Enduring Freedom. The Department of Defense employs numerous means and methods to learn information from various sources that may assist everyone from the commanders in the field in Afghanistan to the police chiefs in small towns throughout the United States. A critical element of the intelligence process is that it must be continuous. The timely, effective use of intelligence provides this nation with the best chance of both achieving unqualified success in combating terrorism abroad and maintaining domestic tranquility at home.

(FOUO) A fundamental tool used in the gathering of intelligence is interrogation. This method of active intelligence gathering permits collection of information from sources with direct knowledge of, among other things, plans, locations and persons seeking to do harm to the United States and our citizens. When done effectively, interrogation provides information that likely could not be gleaned from any other source. Loss of this tool, in any respect, would undermine our nation's intelligence gathering efforts, thus crippling the national security of the United States. The United States does not employ any corporal means of coercion to gain information from persons being interrogated. Rather, the United States has adopted a humane approach to interrogation that relies upon creating an atmosphere of dependency and trust between detainees and the intelligence

Attachment C

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gathering staff assigned to that detainee. Over time, information is learned. The United States is now engaged in a robust program of interrogating individuals who have been identified as enemy combatants in the global War on Terrorism. This is because it is recognized that they unquestionably hold critical information that is crucial to our national security. A prime example of the effectiveness of this method of interrogation through dependency and trust can be found in the announcement this week of the U.S. Government's disruption and detention of a U.S. citizen working in coordination with al Qaida to detonate a "dirty bomb" in the United States. Knowledge and disruption of this plot may not have occurred absent effective intelligence gathered through interrogation.

(FOUO) Interrogation leading to the development of meaningful and usable intelligence is not static. The collection of intelligence is active and ongoing. As new intelligence information is derived from any source, the opportunity to learn additional information through interrogation is presented. We are now living in an age where our nation is engaged in international armed conflict against terrorism. Unlike any previous conflict, we face a foe that knows no borders and perceives all Americans, wherever they may be, as targets of opportunity. Under such circumstances the need to maintain the tightly controlled environment, which has been established to create dependency and trust by the detainee with his interrogator, is of paramount importance. Disruption of the interrogation environment, such as through access to a detainee by counsel, undermines this interrogation dynamic. Should this occur, a critical resource may be lost, resulting in a direct threat to national security.

(FOUO) It has been brought to my attention that efforts are underway to provide detainee Yaser Esam Hamdi, an enemy combatant currently being detained in the Naval brig in Norfolk, Virginia, with access to counsel. Permitting such access to detainee Hamdi may create substantial harm to U.S. national security interests. Most importantly, the disruption occasioned by the insertion of outside counsel, will sever the intelligence gathering value of this detainee. As stated previously, the intelligence gathering process must be continuous. As new information is learned from other sources it serves as a new avenue of interrogation with detained enemy combatants.

(FOUO) Detainee Hamdi's background and experience, particularly in the Middle East, Afghanistan, and Pakistan, suggest considerable knowledge of Taliban and al Qaida training and operations. While we have voluntarily chosen to suspend active interrogations of this detainee pending resolution of legal matters, he would have future value as a source of intelligence. Granting access by counsel under these circumstances will not only disrupt the secure interrogation environment that the United States has labored to create, it will thwart any opportunity to develop intelligence through this detainee.

00000146

2 of 3

BEST AVAILABLE COPY

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(FOUO) Further, providing counsel access to detainee Hamdi may have unintended consequences in a number of other ways. For instance, al Qaida training literature and intelligence gathering efforts have revealed that members have been trained in means of covert communication during periods of capture. As such, counsel could unwittingly provide information to the detainee, or be used by the detainee as a communication tool. This may open an information conduit between detainee Hamdi and members of al Qaida, the Taliban, or other terrorist groups against whom the United States is actively engaged in combat. Also, detainee Hamdi is the only detainee that has been under U.S. control in Afghanistan, Guantanamo Bay and Norfolk. Harmful information could be intentionally or unintentionally passed on concerning these facilities, thus increasing the threat to US forces and facilities in these areas. Finally, information from, or concerning, detainee Hamdi could be brought to the attention of terrorists who later themselves become detainees in Guantanamo Bay. Armed with any such knowledge, such "new" detainees may be able to poison the interrogation environment currently being maintained in Guantanamo Bay by information derived as a result of counsel access to Hamdi.

Signature of Declarant

Executed on 13 June 2002

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00000147

FILED: August 8, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-6895
(CA-02-439-2)

YASER ESAM HAMDI; ESAM FOUAD HAMDI, as next friend of Yaser Esam Hamdi,

Petitioners - Appellees,

versus

DONALD RUMSFELD; W. R. PAULETTE, Commander,

Respondents - Appellants.

ORDER

Appellees have filed a motion to dissolve this Court's stay order of June 14, 2002. Appellants have filed a response in opposition.

The mandate in Hamdi v. Rumsfeld, No. 02-6895, shall issue forthwith and the stay is dissolved in order that the district court may proceed in strict compliance with our July 12, 2002 decision. In that decision, we directed the court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." Hamdi v.

Rumsfeld, 2002 WL 1483908 (4th Cir. July 12, 2002). In accordance with the principles set forth in that opinion, the district court shall consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further.

Entered at the direction of Chief Judge Wilkinson, with the concurrence of Judge Wilkins and Judge Traxler.

For the Court

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi, Petitioners, v. DONALD RUMSFELD Secretary of Defense COMMANDER W.R. PAULETTE, Norfolk Naval Brig Respondents.	)	CASE NO. 2:02CV439

PETITIONER'S NOTICE OF SUPPLEMENTAL MATERIALS

In light of the Court's Order setting this matter for a hearing on August 13, 2002, on the sufficiency of the Declaration of Michael Mobbs, and in accordance with the Court of Appeals for the Fourth Circuit's Order dated August 8, 2002, counsel for Petitioner submits the attached materials which may be referred to during oral argument.

1. Letter dated August 5, 2002, from Esam F. Hamdi to Sen. Patrick Leahy;

2. ABA Task Force on Treatment of Enemy Combatants, Preliminary Report, August 8, 2002;

3. May 20, 2002, Transcript, Hamdi v. Rumsfeld, Case No. 2:02cv348 (E. D. Va.) (Miller, Mag. J.);

4. May 29, 2002, Transcript, Hamdi v. Rumsfeld, Case No. 2:02cv348 (E.D. Va.) (Doumar, J.);

5. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135;

6. Declaration of Frank W. Dunham, and attachment;

7. Matthew Dolan, *U.S.-Born Taliban Held in Norfolk*, Virginian-Pilot, Apr. 6, 2002, at A1;

8. Jess Bravin, *White House Seeks to Expand Indefinite Detentions in Military Brigs, Even for U.S. Citizens*, Wall St. Jrnl., Aug. 5, 2002, at A4

9. *Who Mr. Hamdi Matters*, Wash. Post, Aug. 12, 2002, at B6

Respectfully submitted,

FRANK W. DUNHAM
Federal Public Defender

By: _____
Jeremy C. Kamens
Assistant Federal Public Defender
Virginia State Bar No. 41596
Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510
(757) 457-0800

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 2002, a copy of the foregoing was hand-delivered to Lawrence R. Leonard, Managing Assistant United States Attorney, at the Office of the United States Attorney, Eastern District of Virginia, Norfolk Division, World Trade Center, 101 W. Main, Suite 8000, Norfolk, VA 23510.

Jeremy C. Kamens
Assistant Federal Public Defender

00000152

August 5, 2002

To: SENATOR PATRICK J. LEAHY - CHAIRMAN
433 Russell Senate Office Bldg
(at Constitution and Delaware)
United States Senate
Washington, DC 20510

From: ESAM F. HAMDI
P.O. Box 240
Jubail
Saudi Arabia 31951

Dear Senator Leahy,

I am the father of an American citizen being held as an "enemy combatant" in Virginia. I am writing to you because he needs your help. Although he is an American citizen, my son has been termed an "enemy combatant". He has not been charged with any crime, nor has he been able to learn what evidence, if any, is being used against him. Furthermore, without legal counsel or judicial proceedings, my son has not been given the opportunity to defend himself or face his accusers – rights he should be granted under the Constitution.

His story is quite straightforward. My son is Yaser Hamdi, born in Baton Rouge, Louisiana, when I was working with Exxon Chemical in the United States. He was caught up in a local dragnet of non-Afghans in Mazar-e-Sharif in Afghanistan in November 2001. He was moved to Guantanamo Bay, Cuba, and then to Norfolk, Virginia when it was decided to search for his birth certificate.

00000153

Yaser left our home in Saudi Arabia for Pakistan and then Afghanistan on July 15, 2001 to do relief work in those countries. This was the first time he traveled on his own. Because of his lack of experience, he was trapped in Afghanistan once the military campaign began, although he was able to call

his mother before September 11, 2001 to inform her that he would be returning soon to Saudi Arabia. As you can see from the dates, he was in the area of Pakistan and Afghanistan less than two months prior to September 11th, which is not enough time to receive any military training, so how can he be considered an enemy combatant?

Yaser was caught at the same time Mr. John Walker Lindh was caught, but unfortunately his rights were not treated the same way. He was kept in Afghanistan jail for 2-3 months prior to being moved to Guantanamo Bay where he stayed for 2 months before they confirmed that he is an American citizen, then they moved him to the Norfolk jail.

Moreover, his lawyer is not allowed to see him, and we can not talk to him, whereas Mr. John Lindh moved directly from Afghanistan to the USA not going through Cuba and not staying for a long time in a jail in Afghanistan.

I am writing to you seeking your assistance as an American Senator to help in getting the proper treatment for my son's case and that he is treated fairly as an American citizen, regardless of the background of his parents or the country where he grew up.

Your assistance is highly appreciated.

Best regards,

ESAM F. HAMDI

PRELIMINARY REPORT OF THE
AMERICAN BAR ASSOCIATION
TASK FORCE ON TREATMENT OF ENEMY COMBATANTS

August 8, 2002

I. INTRODUCTION

The September 11, 2001 attack on the United States not only shocked the nation but identified a new type of enemy: a group of individuals of varying nationalities operating with relative freedom in various countries throughout the world who are committed to murdering innocent men, women, and children found in or associated with the United States; destroying both government and private property in the United States, and creating a climate of fear among Americans at home and abroad. The United States reacted, as any nation would and must, with the support of the international community, to protect its people from future attack.

The unprecedented attack resulted in unprecedented responses by the government. Unable to know when and where another attack might occur, the government understandably felt the need to respond quickly and comprehensively to perceived dangers. In the process, the government confronted some United States citizens who carried arms with forces against whom the United States was engaged in battle and others who appeared to be allied with the enemy responsible for September 11th and committed to future assaults on the United States. This confrontation raised an enormously important and difficult constitutional question: what rights does a United States citizen detained by his or her government have when the citizen is alleged to be allied with an enemy group?

00000156

As a nation we have struggled for more than 200 years to establish the proper balance under our Constitution between protection of liberty and individual rights. In time of war or threat of war, the balance may shift – appropriately – toward security, but from past experience we know that such a shift carries with it a danger of government overreaction and undue trespass on individual rights.

The recent cases of Yaser Hamdi[1] and Jose Padilla,[2] United States citizens detained as "enemy combatants," bring this potential danger into sharp relief and raise troublesome and profound issues. The government has taken the position that "with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."[3]

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[1] Yaser Hamdi was captured during the hostilities in Afghanistan, and was initially transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba in January 2002. When it was discovered that he was born in the United States and may not have renounced his citizenship, he was brought to the Naval Station Brig in Norfolk, Virginia in April 2002. He has been continuously detained there as an "enemy combatant."

[2] Jose Padilla, a.k.a. Abdullah al Muhajir, was arrested in Chicago on May 8, 2002 pursuant to a material witness warrant issued in the Southern District of New York. He was detained in New York City until June 9, 2002, when he was declared to be an "enemy combatant" and transferred to the control of the United States military. The United States District Judge, at the request of the Department of Justice, vacated the material witness warrant, and Padilla was transported to the Consolidated Naval Brig in Charleston, South Carolina for detention as an enemy combatant. *See* Government's Motion to Dismiss Amended Petition for Writ of Habeas Corpus in *Padilla v. Bush, et. al.*, Case No. 02-Civ-4445-MBM (S.D.N.Y.).

[3] *See Hamdi v. Rumsfeld*, _____ F.3d ____ , 2002 WL 148390802 at *5 (4th Cir. July 12, 2002). We note that both the Hamdi and Padilla cases are in litigation, and facts and arguments may emerge that have not been made public. It is not our purpose to address these cases specifically, but rather to discuss the implications of them and the principles we believe should be considered as our nation confronts the broader questions they raise.

00000157

The implications of these detentions are much broader than these two cases. Sadly, in what promises to be a long, complex, and difficult struggle with a worldwide terrorist network, this is not likely to be the last instance in which a U.S. citizen is believed to be or accused of acting in concert with such terrorists.

When a nation is at war, measures may seem reasonable that would never be acceptable in a time of peace. This is as true in the United States as in other countries. War, then, poses the challenge of how to protect a nation so that it may survive and prosper without damaging in the process the very liberty and freedoms for which the nation stands. As a distinguished Justice of the United States Supreme Court warned more than fifty years ago:

> ....we must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. There must be a careful balancing of interests. And we must ever keep in mind that 'The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.' Ex parte Milligan, supra, 4 Wall. at pages 120, 121.

Justice Frank Murphy, concurring in *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946).

This is the challenge we faced before, it is the challenge we now face, and sadly it is a challenge unlikely to disappear in the future. How we deal with citizens suspected of terroristic activity will say much about us as a society committed to the rule of law. While we must have the means to prevent more attacks like those of September 11th, we must also insure that there are sufficient safeguards to protect the innocent and prevent possible abuses of power.

In light of the importance of these issues, the ABA Board of Governors, at the request of

00000158

President Robert Hirshon, created a Task Force on Treatment of Enemy Combatants to examine these issues.

The task force is chaired by Neal R. Sonnett, a past chair of the ABA Criminal Justice Section, and its members are: retired Brigadier General John S. Cooke, chair of the ABA Standing Committee on Armed Forces Law; Eugene R. Fidell, president of the National Institute of Military Justice; Albert J. Krieger, chair-elect of the ABA Criminal Justice Section; Stephen A. Saltzburg, a member of the ABA Task Force on Terrorism and the Law; and Suzanne E. Spaulding, chair of the ABA Standing Committee on Law & National Security.

The charge of the Task Force was to examine the framework surrounding the detention of United States citizens declared to be "enemy combatants" and the challenging and complex questions of statutory, constitutional, and international law and policy raised by such detentions.

We have not attempted to address the detention of foreign nationals in immigration proceedings,[4] or individuals held as material witnesses.[5] Nor have we considered – at least at this time – the issue of foreign nationals held as "enemy combatants" at the United States Naval

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[4] The government recently disclosed that, since September 11th, it detained a total of 751 individuals on immigration violations, and 74 people were still being held in INS custody as of June 13, 2002. See *Center for National Security Studies, et al. v. United States Department of Justice*, Case No. 01-2500 (Slip. Op. at p.7)

[5] Two United States District Judges in the Southern District of New York have analyzed the government's use of the material witness statute, 18 U.S.C. §3144 in post 9/11 cases and have reached very different results. Compare *United States v. Awadallah*, 202 F.Supp.2d 55 (S.D.N.Y. 2002) and *United States v. Awadallah*, 202 F.Supp.2d 82 (S.D.N.Y. 2002), both decided on April 30, 2002 with *In re The Application of the United States For a Material Witness Warrant*, ___ F.Supp.2d___, 2002 WL 1592739 (S.D.N.Y. 2002). It is worth noting, however, that material witnesses have the right to appointed counsel. See *In re Class Action Application for Habeas Corpus*

00000159

Base at Guantanamo Bay, Cuba.[4] Rather, our initial concern is whether the government can – or should – be able to detain American citizens indefinitely without charges and hold them incommunicado without a hearing and without access to counsel.[5]

This Report sets forth broad principles which the Task Force believes should govern such detentions. We hope and trust that our analysis, conclusions, and principles will generate discussion and debate on an issue which affects the very fabric of our democracy..

II. BACKGROUND

In the days following the horrific and evil acts of terrorism on September 11, 2001, our nation responded swiftly, aggressively, and with widespread national and international support. Congress did not officially declare war, but it enacted a Joint Resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[6] The United

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on Behalf of All Material Witnesses in Western Dist. of Texas, 612 F.Supp. 940 (W.D.Tex.1985).

[4] Two United States District Courts have recently dismissed habeas corpus claims on behalf of Guantanamo detainees on jurisdictional grounds because the detainees were not within the territorial jurisdiction of the courts. See *Coalition of Clergy v. Bush*, 189 F.Supp.2d 1036 (C.D.Cal. 2002); *Rasul v. Bush*, 2002 WL 1760825 (D.D.C. 2002).

[5] As we discuss further *infra*, we fully recognize the necessity under some circumstances to detain persons in order to prevent them from engaging in future terrorist attacks. But the power to detain has obvious implications for individual rights and liberty and therefore merits serious and careful examination.

[6] Public Law 107-40, 115 Stat. 224. The Preamble to the resolution states that the acts of September 11 were attacks against the United States that "render it both necessary and appropriate that

00000160

Nations Security Council approved a resolution recognizing the United States' right to self-defense,[7] and NATO's North Atlantic Council stated that it regarded the attack as an action implicating Article V of the Washington Treaty that "an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against all."

The September 11 attacks were viewed as both crimes and acts of war, and the United States has responded with both military operations and law enforcement actions. Under the circumstances, legal doctrines and principles from both domestic criminal procedure and international law, including the law of war, have been applied. Because of the unique nature of the attacks and our responses to it, it is not surprising that these doctrines and principles have been applied in new ways and have, to some extent, overlapped.

III. ANALYSIS AND LEGAL PRINCIPLES

A. Detention of "Enemy Combatants"

The government maintains that individuals declared to be "enemy combatants" may be detained indefinitely and have no right under the laws and customs of war or the Constitution to meet with counsel concerning their detention. The term "enemy combatant" is not a term of art which has a long established meaning. According to one commentator:

> Until now, as used by the attorney general, the term "enemy combatant" appeared nowhere in U.S. criminal law, international

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the United States exercise its rights to self-defense."

[7] See U.N.S.C.Res. 1368.

00000161

> law or in the law of war. The term appears to have been appropriated from ex parte Quirin, the 1942 Nazi saboteurs case, in which the Supreme Court wrote that "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property [would exemplify] belligerents who are generally deemed not to be entitled to the status of prisoner of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."

Solis, "Even a 'Bad Man' Has Rights," *Washington Post*, Tuesday, June 25, 2002, Page A19.

In the law of war, "enemy" generally describes an opposing state or quasi-state with which another state or quasi-state is at war.[10] In a war between states, the enemy consists of all the citizens of the other state. In wars involving non-states (typically insurgents or contestants in a civil war), who constitutes the enemy is less clear. The "enemy" as an institution or organization (e.g., an insurgent group or a band of partisans) usually does not have a legally cognizable status like a state.

Moreover, who "belongs" to this de facto organization rests not on a single, fairly objective, not easily changed factor like citizenship, but on each individual's allegiance as reflected in acts or even words. In many modern conflicts, including the present one, it is not

"War" may exist when a state of war has been declared or when activities involving the use of force rise to such a level that a state of war exists. Absent a declaration of war, there may be some uncertainty whether a state of war exists, depending on the level and nature of hostile activities. On September 18, 2001, Congress' Joint Resolution (Public Law 107-40, 115 Stat. 224) authorized the President "to use all necessary force against those nations, organizations, or persons he determines planned authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Based on this and U.S. combat operations in Afghanistan it may be concluded that the United States is at war with al Qaeda, the organization deemed responsible for the September 11 attacks.

00000162

unusual for persons to hide their allegiance to the enemy for tactical or other purposes.

In the law of war, a "combatant" commonly refers to members of an armed force.[11] Members of a state's armed force are usually clearly distinguishable from civilians, including other government officials and employees. Members of the force normally wear uniforms and carry a distinctive identification card or document. In an organization, such as a rebel group, with an irregular armed force, the line between combatants and noncombatants is much less clear.[12]

See Article 4A(1), Geneva Convention Relative to the Treatment of Prisoners of War, 1949

This is one reason for the requirements for a recognized chain of command and distinctive insignia.

00000163

There is precedent for treating U.S. citizens as enemy combatants. *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 2 (1942) was a case in which German soldiers smuggled themselves into the country, hid their uniforms and planned sabotage here before being caught.[13] They were arrested, prosecuted for what were regarded as crimes of war, convicted, and sentenced – six to death. The Court stated:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

Id. at 317 U.S. 1, 30-31 (1942) (footnotes omitted). However, *Quirin* may not provide the clear precedential value claimed by the government: there was a formal Congressional "Declaration of War" against Germany, and all eight of the defendants were in fact uniformed members of the German military who donned civilian clothing after surreptitiously entering the United States to engage in sabotage.

Moreover, *Quirin* does not stand for the proposition that detainees may be held incommunicado and denied access to counsel, since the defendants in *Quirin* were able to seek review and they were represented by counsel. Since the Supreme Court has decided that even

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[13] *Quirin*, of course, arose during a declared war against nations who were identified enemies. Although two of the detainees claimed to have American citizenship, that claim was not central to the case, and the Supreme Court had little difficulty in finding that Americans who donned foreign uniforms and swore allegiance to a country at war with the United States could lawfully be treated like other members of the armed forces of the enemy country

00000164

enemy *aliens* within the United States are entitled to review, that right could hardly be denied to United States citizens.[14]

In *In re Territo*, 156 F.2d 142 (9th Cir. 1946), a U.S. citizen was captured in Italy while serving in the enemy Italian army and held as a POW in the United States. The court upheld the denial of his petition for writ of habeas corpus, stating, "all persons who are active in opposing an army in war may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war."

Quirin and *Territo* arose in World War II. Little question existed about who the enemy was or whether the *Quirin* defendants or Territo were members of the enemy armed forces. Thus, these decisions turned not on whether the detainees were enemy combatants, but on whether enemy combatants – even if U.S. citizens – could be detained and tried by the military. In the current situation, these lines are less clear, both in general and in application in specific cases.

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[14] "The contention that enemy alien belligerents have no standing whatever to contest conviction for war crimes by habeas corpus proceedings has twice been emphatically rejected by a unanimous Court. In Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3, we held that status as an enemy alien did not foreclose 'consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.' Id., 317 U.S. at 25, 63 S.Ct. at 9, 87 L.Ed. 3. This we did in the face of a presidential proclamation denying such prisoners access to our courts." *Johnson v. Eisentrager*, 339 U.S. 763, 784-85, 70 S.Ct. 936, 951-52 (1950) (Justice Black dissenting)

00000165

For this reason, the power to label a citizen an "enemy combatant" is potentially very broad.

B. Application of United States Law

Neither the Joint Resolution authorizing the use of force nor any laws enacted in response to the terrorist attacks have addressed the detention of United States citizens as enemy combatants. That is an important consideration, since existing law calls such detention into serious question.

Title 18, §4001(a) of the United States Code provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The legislative history indicates that this statute applies in the case of any detention of U.S. citizens, and is not limited to the control of civilian prisons:

> **The twofold purpose of the amended bill is (1) to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists and (2) to repeal the Emergency Detention Act of 1950 (Title II of the Internal Security Act of 1950) which both authorizes the establishment of detention camps and imposes certain conditions on their use.**

House Report No. 92-116, p. 1435, April 6, 1971, Cong. Record Vol. 117, (1971). The House Report explained that specific repeal of the Emergency Detention Act[15] and that the "mere continued existence" of the act had "aroused much concern among American citizens, lest the Detention Act become an instrumentality for apprehending and detaining citizens who hold

[15] The Act had been enacted at the beginning of the Korean War in order to allow for the "apprehension and detention, during internal security emergencies, of individuals deemed likely to engage in espionage or sabotage." *Id.* at 1436

00000166

explained in *Harris v. Nelson*, 394 U.S. 286, 291, 89 S.Ct. 1082, 1086 (1969):

> **The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended * * *.' U.S.Const., Art. 1, s 9, cl. 2. The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.**

The Court further commented:

> **There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom** contrary to law.

Id., 394 U.S. at 292, 89 S.Ct. at 1087.

00000167

C. The Geneva Conventions

The four Geneva Conventions of 1949, to which the United States is a party, provide the general framework for analysis of the grounds and procedures for detention and treatment of enemy combatants. The treatment of captured combatants during an armed conflict is covered by the Third Geneva Convention Relative To The Treatment of Prisoners of War, which defines prisoners of war (POWs) and sets forth the framework for their protection. Persons not entitled to POW status, including so-called "unlawful combatants," are nevertheless entitled to protections provided by the Fourth Geneva Convention Relative To The Protection of Civilian Persons in Time of War. However, in cases in which a civilian has engaged in "acts hostile to the security of the State, such individual shall not be entitled to claim such rights and privileges ... as would ... be prejudicial to the security of such State."

Thus, certain lines of demarcation have been drawn that distinguish what is expected of government in various circumstances. It is relatively clear that when we are at war fighting against a declared enemy, as in World War II for example, enemy prisoners who are captured on the battlefield or in the combat arena are declared Prisoners of War and entitled to protection as such. Those prisoners must be treated in accordance with the Convention and have rights under the Convention. They are not criminal defendants; they have no right to counsel; they may be questioned but need not provide any information other than name, rank serial number and date of birth. Prisoners of war do have the right, subject to censorship for security purposes, to correspond with others outside the prison.

Some individuals are captured during war on the battlefield or in the combat arena but do

00000168

not qualify as prisoners of war. Such persons are those who have committed a belligerent act and have been captured, but are not part of an organization that qualifies its members as Prisoners of War. Under some circumstances the Fourth Geneva Convention permits detention of civilians in a war zone.

Since it is not always clear whether an individual captured during a war qualifies as a Prisoner of War, Article 5 of the Geneva POW Convention[19] provides that when there is doubt about the status of a captured individual, he or she will be treated the same as a Prisoner of War until such time as his or her status has been determined by a competent tribunal.[20] The Article 5

[19] Article 5 states:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

[20] The United States has substantial experience with Article 5 of the Convention; for example, it established Article 5 tribunals for thousands of individuals during the Gulf War. See *Operational Law*

00000169

process, however, is not directly relevant to our examination of the treatment of U.S. citizens who are detained in this country.

D. International Human Rights Laws and Treaties

Any analysis of the treatment of enemy combatants must also consider a variety of other recognized international agreements which are relevant to our analysis, particularly to the issue of access to counsel. They include:

Handbook, JA 422 (Charlottesville 1977) at 18-8

00000170

1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights, adopted in 1948, has been strongly supported by the United States. Indeed, President Bush proclaimed December 9, 2001 as "Human Rights Day & Bill of Rights Week"[21]

Article 8 declares that everyone "has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" and Article 9 provides that no one "shall be subjected to arbitrary arrest, detention or exile."

2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the United Nations General Assembly in 1988, requires that "[a] detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it." More important, Principle 18 provides:

1. A detained or imprisoned person shall be entitled to communicate

[21] The Proclamation, issued for the Declaration's 53rd anniversary, stated: "The terrible tragedies of September 11 served as a grievous reminder that the enemies of freedom do not respect or value individual human rights. Their brutal attacks were an attack on these very rights." President Bush called on "the people of the United States to honour the legacy of human rights passed down to us from previous generations and to resolve that such liberties will prevail in our nation and throughout the world as we move into the 21st century."

00000171

and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

3. International Covenant on Civil and Political Rights (ICCPR)

The International Convention on Civil and Political Rights was adopted and opened for signature, ratification and accession by U.N. General Assembly resolution 2200A (XXI) on December 16, 1966, and became effective in 1976, following ratification by the necessary number of states.[22] Article 14 of the ICCPR describes certain standards and procedures that should be

[22] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

00000172

used in all courts and tribunals.[23]

IV. DISCUSSION

The attack on the United States on September 11, 2001 – as well as other attacks on United States embassies, personnel, and property abroad – raise new and difficult questions for our legal and political systems. Once it began, the hijacking of planes and wanton and willful taking of lives could not go unanswered. The openly declared goal of Al Qaeda to inflict a holy war upon the United States could not go unrecognized. No President or Congress could ignore the threat and pretend that further attacks should not be expected.

The need for action was undeniable. Congress authorized the President to respond. The

[23] At the American Bar Association Midyear meeting in February 2002, the House of Delegates considered and adopted a Report and Recommendation relating to the November 13, 2001, Military Order Regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." Recommendation 6 urged the President and Congress to assure that the law and regulations governing any tribunal would "[r]equire compliance with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights, including but not limited to, provisions regarding prompt notice of charges, representation by counsel of choice, adequate time and facilities to prepare the defense, confrontation and examination of witnesses, assistance of an interpreter, the privilege against self-incrimination, the prohibition of *ex post facto* application of law, and an independent and impartial tribunal, with the proceedings open to the public and press or, when proceedings may be validly closed to the public and press, trial observers, if available, who have appropriate security clearances."

00000173

United Nations recognized the need for the United States to act in self-defense. Accordingly, the President committed American armed forces to do battle with the Taliban and Al Qaeda in Afghanistan. Whether this was a declared war or not, it was approximately as clear who the enemy was in Afghanistan as in previous conflicts: namely, the enemy were the Taliban fighters who repressed the people of that country and the Al Qaeda forces who benefitted from Taliban protection while providing substantial resources to support the Taliban forces.

Many suspected Taliban and Al Qaeda forces or supporters who were captured in battle have been detained, and questions about those detainees abound. Most knowledgeable people recognize that they are difficult questions to answer and involve the law of war, international law, and treaty obligations. Even so, there is concern among many Americans about the prudence, if not the legality, of prolonged incommunicado detention of a large group of people far removed from the battle in which they were captured.

As a society, we know that America is a land in which dissent is a fundamental right, but we take pains to assure that dissent is not confused with treasonous acts. We do not lightly presume that Americans, even those who protest and complain about their country's policies, are "enemies."

If an American citizen who is detained as a Prisoner of War or as an illegal combatant is subsequently prosecuted for treason or for another crime against the United States, that citizen will have the benefit of the constitutional protections afforded all defendants in American criminal prosecutions. The right to counsel, the privilege against self-incrimination, the right to jury trial and other familiar rights will attach once prosecution commences.

00000174

There is reason for confidence, therefore, that an American who is charged with a crime against the United States, even one involving the taking up arms against the United States, will receive the full panoply of rights traditionally afforded criminal defendants. Neither the Executive nor the Congress has sought to interfere with the exercise of these rights, and there is no indication that Due Process will be denied those charged with federal crimes.

But, there is genuine reason for concern about a President's – or anyone's – power to unilaterally declare that an American citizen who is arrested in the United States or elsewhere far from any battlefield or combat arena is part of the enemy and thus may be treated in the same way as enemy seized in battle. Indeed, it is both paradoxical and unsatisfactory that uncharged U.S. citizen detainees have fewer rights and protections than those who have been charged with serious criminal offenses, like John Walker Lindh, a U.S. citizen, or foreign nationals like Zacarias Moussaoui, the alleged "20th hijacker" and Richard Reid, the alleged "shoe bomber."

The war on terrorism requires that new questions be asked. With whom are we at war? Who defines the enemy? How does one conduct war against individuals or groups of individuals who swear no allegiance to any nation and whose affiliations to each other are not always clear? What qualifies an individual as a combatant? Who has the right to negotiate to end the war? Who defines how long the war will last? Where is the war actually being fought?

Without knowing the full and complete answers to these broad questions, it is not clear how to answer the narrower questions: May the Executive detain an American citizen or any other person lawfully in the United States as an "enemy", a "combatant", or an "enemy combatant" on the basis of a unilateral determination that the individual is "connected to", a

00000175

"supporter of"; a "member of"; or an "aider, abettor or coconspirator of" an individual or group that has participated in an attack on the United States or expressed support for such an attack?

What standard – reasonable suspicion, probable cause, etc. – applies to such detention? What time limit, if any, applies to such detention? Is there any judicial review available to a detainee? If a decision is made to detain, must that decision be periodically reviewed? Does a detainee have a right to consult with counsel with respect to detention? While being detained?

U.S. courts have generally deferred to military judgment concerning POW status and related questions. See *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Hamdi v. Rumsfeld*, ___ F.3d ___ (July 12, 2002).[24] This deference flows from the President's and Congress' primary responsibility for foreign affairs and the prosecution of war, and from the potential damage of judicial interference in military operations. However, the same is not true in circumstances involving U.S. citizens not on the battlefield or in the zone of military operations. See *Ex parte Milligan*, 71 U.S. 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).[25]

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[24] See also *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Territo*, 156 F.2d 142 (9th Cir. 1946).

[25] It should be noted that POWs are entitled to and generally can communicate with outsiders. Through such communications they can gain the services of an attorney who can seek relief in an appropriate court. POWs may also communicate, through their chain of command, with representatives from neutral states and international organizations, and in this way raise issues concerning their detention.

00000176

Moreover, the federal judiciary has little experience with detention of Americans as enemy combatants outside a declared war, with nations as enemies, and with captured soldiers. *Ex parte Milligan* and *Ex parte Quirin* can be cited for and against judicial involvement in Executive determinations as to combatants, but the reality is that neither decision addresses whether there can be detentions of Americans or lawful residents without some form of judicial review.[26]

V. RECOMMENDATIONS

We fully recognize that these are very difficult and complex issues. The stark reality is that there is no universal consensus as to the right answers to either the broad or the narrow questions now facing our nation. With the disquieting recognition that the battles of the future could focus on individuals and groups spread among as well as on nations themselves, we nonetheless believe that there are certain principles that should and could receive support from those who appreciate the need to assure that we do not lose our sacred liberties and freedoms while we fight to save them.

The Task Force therefore recommends that the following principles be followed with respect to the treatment of U.S. citizens declared to be enemy combatants:

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[26] History has not been kind to the Japanese internment cases, which upheld detention of American citizens and lawful residents. Judicial review was ultimately provided, internment was sustained, and the decisions have been questioned as much as any in American law. Indeed, Congress passed the Civil Liberties Act of 1988 "to provide a Presidential apology and symbolic payment of $20,000.00 to the internees, evacuees, and persons of Japanese ancestry who lost liberty or property because of discriminatory action by the Federal government during World War II." See http://www.usdoj.gov/kidspage/crt_redress.htm.

00000177

1. The Administration Should Explain the Basis and Scope of Its Authority to Detain U.S. Citizens as Enemy Combatants

The administration should explain, more fully and formally than it has, the basis for detaining someone as an enemy combatant, especially Americans seized far from any recognized battlefield or combat zone.

This is important as a matter of domestic and international law and public support. Actions taken today will serve as precedents forever. Regardless of the wisdom and good faith with which actions are taken, detention without process in a few cases may be used as justification by others for much broader use of such detention.

By better explaining the rationale for such detention (even recognizing that security concerns may limit what can be made public), the government can win support – assuming its reasoning is sound – and can cabin the authority should others try to extend it inappropriately. There may be substantial reasons for such detentions that would be consistent with domestic and international law, but it is also possible that the case for detention is problematic and might create a dangerous precedent.

The Administration has not yet attempted to explain what procedures it believes should be required to assure that detentions are consistent with Due Process, American tradition, and international law. It cannot be sufficient for a President to claim that the Executive can detain whomever it wants, whenever it wants, for as long as it wants as long as the detention bears some relationship to a terrorist act once committed by somebody against the United States. Short of such a claim, what are the limits?

00000178

2. Congress Should Establish Clear Standards and Procedures Governing Detention of United States Citizens

Congress, in coordination with the Executive branch, should examine the issue of detaining U.S. citizens as enemy combatants, and should enact legislation establishing clear standards and procedures governing the detention and treatment of U.S. citizens detained as enemy combatants. This is particularly necessary in light of our discussion of 18 U.S.C. §4001(a), *supra*.

The Task Force acknowledges the need to give proper deference to the Executive Branch in times of crisis, but neither the Congress nor the Courts should hesitate to question actions which may impact upon or violate long cherished constitutional principles. As the Washington Post recently observed in an editorial:

> . . . the government's actions in this latest case cut against basic elements of life under the rule of law. If its positions are correct, nothing would prevent the president – even in the absence of a formal declaration of war – from designating any American as an enemy combatant. Without proving the correctness of the charge before a court, the military could then detain that person forever. And having done so, it could prevent that detainee from hiring a lawyer to argue that the government, in fact, has it all wrong. If that's the case, nobody's constitutional rights are safe. The administration owes the country a more thoughtful balance; Congress's role – the patriotic thing to do – is to help find it.

Editorial, "Detaining Americans" Washington Post, Tuesday, June 11, 2002, Page A24.

Congress should also maintain continuing oversight of detention of U.S. citizens to assure that such detentions are consistent with Due Process, American tradition, and international law.[37]

[37] As part of its oversight authority, Congress should consider requiring periodic reports from the Executive, and should include a provision in the proposed Homeland Security Department providing the Inspector General with specific authority to investigate allegations regarding denial of access to counsel

00000179

As Sen. Russell Feingold (D-WI) observed during a United States Senate Judiciary Committee hearing:[28]

> ...I do think we need to learn a lesson from this history to question our government when it appears to be overreaching. Such questions are not unpatriotic and should not be viewed as an inconvenience by the Executive Branch. They are a crucial tool for Congress to play its constitutional role in protecting the great heritage of this country and the rule of law.

or violations of constitutional rights arising from continued detentions.

[28] Senate Committee on the Judiciary, December 4, 2001. http://judiciary.senate.gov/member_statement.cfm?id=128&wit_id=85

00000180

3. Citizen Detainees Should Have Access to Judicial Review to Challenge Their Detention

As set forth above, United States citizens who are detained by the Government have a right under the Constitution to seek release from their detention through a petition for writ of habeas corpus, a fundamental right which Congress has not suspended. Citizen detainees who have not been charged with violations of United States criminal laws or the law of war should therefore be afforded a prompt opportunity for judicial review of the basis for their continued confinement.

4. Citizen Detainees Should Not be Denied Access to Counsel

The most complex issue examined by the Task Force is that of access to counsel. We agree that a United States citizen detainee should not be denied access to the courts and he or she should, at the very least, have the right to contact an attorney in order to seek habeas corpus relief.

We also agree, however, that the 6th Amendment right to counsel does not technically attach to uncharged enemy combatants, and we recognize that, depending on the geographical location and the state of hostilities, there may be circumstances in which providing a detainee with access to counsel could be unwise, impractical, or dangerous.[29]

While we are mindful of such concerns, we do not believe that citizens detained within the United States, far from the battlefield, fall within that category. Indeed, the right to prompt judicial review may well be hollow unless citizen detainees are afforded meaningful access to

[29] For example, no reasonable person would suggest that the battle should pause while a combatant captured and detained on the battlefield is granted a visit from his or her lawyer.

00000181

counsel and to the effective assistance of counsel in order to appropriately challenge their detention.

Government concerns that affording access to counsel may impede the collection of intelligence are not, in our view, so compelling that they justify denial of access to assistance of counsel. Nor are concerns that counsel might be used by detainees to facilitate communications with others. We have confidence that our nation's lawyers can provide effective representation without breaching security. When government practices result in indefinite incommunicado detention, they must be weighed against the requirements of the rule of law and the sacred tradition of providing our nation's citizens with full Due Process rights.

5. Consideration Should be Given to the International Impact of Our Treatment of Enemy Combatants

Finally, we urge the Executive and Legislative branches, in establishing and implementing procedures to govern the detention of U.S. citizens held as enemy combatants, to give full consideration to the impact of its policies as precedents in the use of international legal norms in shaping other nations' responses to future acts of terrorism.

VI. CONCLUSION

The Task Force respects and supports President Bush and his administration in their efforts to root out terrorism and assure our homeland security. Of course, we should have the means to prevent more attacks like those of September 11. At the same time, there must be safeguards to protect the innocent and prevent possible abuses of power.

Since our Nation's founding, it has been a bedrock principle of our Democracy that is it

00000182

the duty of the courts to protect the constitutional rights of citizens from overreaching government authority—even when that authority is well-intentioned, and regardless of how unpopular or hated those citizens might be. "Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land."[30]

We would do well to heed the admonition of Justice Murphy in *Duncan v. Kahanamoku*, 327 U.S. 304, 335:

> Moreover, we must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties. There must be a careful balancing of interests. And we must ever keep in mind that 'The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.' Ex parte Milligan, supra, 4 Wall. at pages 120, 121.

We are a great nation not just because we are the most powerful, but because we are the most democratic. But indefinite detention, denial of counsel, and overly secret proceedings could tear at the Bill of Rights, the very fabric of our great democracy.

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[30] *Bridges v. Wixon*, 326 U.S. 135, 166 (1945) (Justice Murphy, concurring.)

00000183

The ABA Task Force on Treatment of Enemy Combatants will continue to review and analyze these issues, and the American Bar Association stands ready to be of assistance in any way to help establish standards and procedures to ensure that we do not erode our cherished Constitutional safeguards and that we strengthen the rule of law.[31]

We must get this right. The people of this great country deserve no less.

[31] As Justice Brandeis warned: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

00000184

AMERICAN BAR ASSOCIATION
TASK FORCE ON TREATMENT OF ENEMY COMBATANTS

SUMMARY OF RECOMMENDATIONS

1. **The Administration Should Explain the Basis and Scope of Its Authority to Detain U.S. Citizens as Enemy Combatants**

2. **Congress Should Establish Clear Standards and Procedures Governing Detention of United States Citizens**

3. **Citizen Detainees Should Have Access to Judicial Review to Challenge Their Detention**

4. **Citizen Detainees Should Not be Denied Access to Counsel**

5. **Consideration Should be Given to the International Impact of Our Treatment of Enemy Combatants**

00000185

ABA Task Force on Treatment of Enemy Combatants

Chair

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Members

JOHN S. COOKE is the Director of Judicial Education at the Federal Judicial Center. He retired from the United States Army in 1998 as a Brigadier General after twenty-six years of service in the Judge Advocate General's Corps. He served as Chief Judge, U.S. Army Court of Criminal Appeals, Commander, U.S. Army Legal Services Agency, Judge Advocate (senior legal advisor) for U.S. Army forces in Europe, and Deputy Commandant, The Judge Advocate General's School. He is outgoing chair of the ABA Standing Committee on Armed Forces Law and served on the ABA Task Force on Terrorism and the Law.

EUGENE R. FIDELL is president of the National Institute of Military Justice and a partner in the Washington, D.C. firm of Feldesman, Tucker, Leifer, Fidell & Bank LLP. He served on the Code Committee on Military Justice and the Advisory Board on the Investigative Capability of the Department of Defense, and has taught Military Justice at Yale Law School. He is coeditor (with Dwight H. Sullivan) of Evolving Military Justice (Naval Institute Press 2002) and edited NIMJ's forthcoming Annotated Guide to the Procedures for Trials by Military Commissions (LEXIS/NEXIS Matthew Bender 2002).

ALBERT J. KRIEGER is a nationally renowned criminal defense trial attorney now in his 54th year of practice. He is the incoming chair of the ABA Criminal Justice Section and a past president of the National Association of Criminal Defense Lawyers, which he represents in the ABA House of Delegates. He served two terms on the ABA Criminal Justice Standards Committee, and he has been honored by local, state, and national bar associations throughout the nation for his lifetime of contributions to the adversary system of criminal justice.

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SUZANNE SPAULDING currently serves as chair of the ABA Standing Committee on Law and National Security. She has served as Executive Director of the National Commission on Terrorism (the "Bremer Commission") and Executive Director of the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction. She is a former Deputy Staff Director and General Counsel for the Senate Select Committee on Intelligence, and a former Assistant General Counsel for the Central Intelligence Agency.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

YASER ESAM HAMDI
Petitioner,
FRANK W. DUNHAM, JR., As Next Friend of Yaser Esam Hamdi,
Petitioner
v.
DONALD RUMSFELD, Secretary of Defense
Respondent,
COMMANDER W.R. PAULETTE
Respondent.

CIVIL ACTION
NO. 2:02cv348

TRANSCRIPT OF MOTION FOR TIME EXTENSION

Norfolk, Virginia

May 20, 2002

Before: THE HONORABLE TOMMY E. MILLER
United States Magistrate Judge

Appearances:

OFFICE OF THE FEDERAL PUBLIC DEFENDER
By: FRANK W. DUNHAM, JR.
LARRY W. SHELTON
GEREMY C. KAMENS
Counsel for the Petitioner

LAWRENCE R. LEONARD
Assistant United States Attorney
Counsel for the Respondent

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THE DEPUTY CLERK: Case No 2:02cv348, Yaser Esam Hamdi versus Donald Rumsfeld, Secretary of Defense, et al.

Mr. Dunham, is the petitioner ready to proceed?

MR. DUNHAM: Yes, we are, Your Honor.

THE COURT: Mr. Leonard, is the respondent ready to proceed?

MR. LEONARD: Yes, sir, we are.

THE COURT: Mr. Leonard, this is your motion for an extension of time in which to file the answer to the petition for habeas corpus. I would like to comment on one footnote you have in there. We do hundreds of habeas corpuses in this court every year. I frequently give the United States 60 days to respond and -- the ones that are referred to me, the 2241 parole issues. The reason for that, or one reason is that the defendant has already been tried, he's convicted, he's had an appeal and a right of writ to the Supreme Court, and now he's back through going through another -- he's already had administrative dealings with the parole board. So at least that person has had due process granted to him. So I don't think that's a good analogy as to the amount of time that should be granted in this case where it's alleged to have, at least in the petition, and I have no information other than what's in the petition, that there has been no due process and this person is an American citizen. So I think it's apples and oranges in that type of habeas, and I wanted to mention that

before you started.

MR. LEONARD: All right. Very well, Your Honor. I appreciate that, and my purpose in referencing that was simply to point out that there are a myriad of reasons why the court can exercise its discretion to provide a lengthier period of time than might be provided for under Rule 82, and Rule 84 gives the court that discretion.

THE COURT: 81.

MR. LEONARD: Excuse me, 81.

THE COURT: Subsection (a)(2).

MR. LEONARD: Thank you. And the court has in the past exercised that discretion. I recognize the issues here are different from the typical habeas petition that the court sees.

On that note I would point out that the petitioner in this case, specifically Mr. Hamdi, I believe it's undisputed, was seized as a combatant in Afghanistan. He was seized by the military in a foreign action. Excuse me, in a military action on a foreign battlefield.

THE COURT: I'm not sure if that's disputed or not, but we will hear from Mr. Dunham on that.

MR. LEONARD: All right. I am taking that from the allegations in the petition. Mr. Hamdi was seized in Afghanistan, and there was an ongoing military action between the military forces of the United States and combatants

representing the Taliban and al Qaida. It was in that context that Mr. Hamdi has made his way into the custody of the United States military.

It is in that context that the petitioner raises issues which are of extreme importance to both the national security and the national defense of this country. For that reason the respondents are seeking merely a 21-day extension of time to address the legal issues that have been raised in the petition.

Additionally because of the importance of these issues, it is necessary to coordinate the efforts and the input from various levels of the executive branch: the Department of Justice, including the criminal division, and the Soliciter General's Office; the Department of State; and the Department of Defense. Inasmuch as the court has provided only nine days to respond to this petition --

THE COURT: Which is triple the amount that Rule 81 provides for, and the statute 28 U.S.C. 2243, the second paragraph provides for three days, and I considered some of what you are raising in allowing nine days for the response on my own motion.

MR. LEONARD: I understand.

THE COURT: But you are right, I do have discretion.

MR. LEONARD: All right. And it's our position that the court should exercise that discretion to provide a total of

30 days that would allow both the coordination necessary for the various arms in the executive branch to prepare a thorough and efficient response and also to allow sufficient time to address these important issues because, as I said, we are dealing with an individual who was seized on the field of battle in a foreign land by the United States military. The case law from the Supreme Court on down is replete with cautions that the judiciary should exercise a great deal of restraint before injecting itself in these kinds of issues, which is not to say that the judiciary should stand by totally, but merely that in this case a 30-day total period of time to provide a response to the petition is certainly reasonable.

THE COURT: How long has this person been in custody? Do you have any idea?

MR. LEONARD: My understanding is that the United States military acquired custody of Mr. Hamdi approximately five months ago.

THE COURT: And according to the petition, I think he's been in the United States in this district since April 6th. I believe that's what the petition says.

MR. LEONARD: I think that's correct.

THE COURT: Are you finished?

MR. LEONARD: Yes, Your Honor.

THE COURT: Before you sit down, there are two issues raised by the response filed by the Public Defender, and they

want two things: Provide timely and reasonable access to the petitioner. I assume by their office and only their office, but we will hear about that, and to agree not to move the petitioner during the pendency of this petition. Do you care to respond to either of those issues now?

MR. LEONARD: Just generally, Your Honor. With respect to the Public Defender's request for access to Mr. Hamdi, it's the position of the respondents that Mr. Hamdi is an unlawful enemy combatant, and as such that's why he's being held under these circumstances. If the government --

THE COURT: You say that's the position, but until you answer, I don't know what your position is.

MR. LEONARD: Well, that's correct, Your Honor, and that ties me to what I was going to say next, which is, therefore, the right to access to counsel is tied up in the merits of the petition for if the government is correct, then there is no right to counsel. So it would seem to me to be putting the cart before the horse to provide that access which the petition may later determine is unwarranted.

It's also the position of the respondents that access to counsel might interfere with the important national security purposes for which we are holding Mr. Hamdi. With respect to the second issue about moving Mr. Hamdi, of course he's in the custody of the United States military, and so at this juncture I can't make any representations one way or the other about any

reasons that may come up which might require and necessitate relocating Mr. Hamdi from one location to another.

THE COURT: All right. Mr. Dunham, Mr. Shelton whoever is going to argue?

MR. DUNHAM: Your Honor, we try not to be unreasonable when the other side calls us and asks for more time because we frequently need the same courtesy, but in this situation we simply asked to have access to Mr. Hamdi in that interim.

As the government represents, they say this is a matter of highest national importance. They need consultation at the various highest levels of government. I note that Mr. McNulty, who I had conversations with about this case, is not here this morning. But in my conversations with him I did say, you know, we might not oppose a motion for an additional period of time if we could have access to our client and if they would agree that we would not be prejudiced because the status quo would be maintained. In other words, they would not move him and we would be allowed to see him.

Now, it seemed to me that being allowed to see him is important. I mean, the issue that we can't have access to him because he's an unlawful enemy combatant. I mean, it seems to me that the United States has not stated that that's why they are holding him. They haven't answered us. They say they can't answer us. They can't answer us in nine days as to the

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reason why they are holding Mr. Hamdi. Yet if we could see him, Mr. Hamdi might tell us, like some of these our fundamental Islamist persons that have been caught up in all of these 9-11 events, he might tell us I don't want this, in which case this whole matter would go away. He may say I don't want an infidel Christian lawyer representing me on a habeas corpus petition in the United States district court.

I mean, we are here because we can't get access to him and we've had to act at the request of his father, and it seems to me foolish for the United States to come into court and say this is a matter of national significance and not allow Mr. Hamdi, who's a U.S. citizen to have access to a lawyer.

THE COURT: Is that undisputed, that he's a U.S. citizen?

MR. DUNHAM: The government did not dispute it in their remarks. We provided his birth certificate to the court. I mean, he's a U.S. citizen and he ought to have the right to counsel in a matter such as this, and it seems to me that allowing him to have the right to counsel could solve a bunch of problems. At least if he says, hey, I want you to go forward for me, it at least allows us to find out what his side of these things are. Otherwise, you are going to get a one-sided presentation from the United States as to what happened. I mean, he could have been a mere bystander as to what was going on over there at the time he was gathered up in

some group arrest or something. We don't know what his story is, and I think in order for this court to proceed with this matter, we have a right to find out what his side of things are. He's right here in Norfolk.

THE COURT: Do you agree with Mr. Lechard that if he in fact is an unlawful enemy combatant, that he has no right to counsel?

MR. DUNHAM: No. He's a U.S. citizen, and I believe he would have a right to counsel. They would have to show me where a U.S. citizen who's arrested by the military doesn't have the right to have a lawyer. I believe he does.

Now, I also believe that not only do we need to see him to find out if he wants us to proceed and to find out what his side of things is, he may well contest that he was an enemy combatant. He may want to be able to present evidence to this court that he was not.

So our position is that the court's nine-day response time was reasonable given the fact that we've not been allowed to see the client. I point out to the court that on April 1[7] I wrote to the Commander Paulette who has custody of Mr. H[amdi] at the Navy brig, and I didn't ask him, you know, to re[lease] him. I asked him could we please see him, and I got [a] five days later saying, "We will provide you a res[ponse] course." And as we stand here today, we still h[ave no] response as to whether or not we can see him.

small step to take, and I believe that if the court is going to grant any additional time to the government, it should come with an order that we be allowed to see Mr. Hamdi and that he not be moved in the interim. Otherwise, we would ask the court to hold to the original schedule because the delay is prejudicial to Mr. Hamdi under these circumstances.

THE COURT: Even if he is moved, the Supreme Court of the United States has said that if the petition has been filed and served -- and it's been an adventure getting it served on the commander of the Naval brig. I can tell you that from the Marshal's standpoint. It's been served on him. It's been served by certified mail on Secretary Rumsfeld, and the Supreme Court says even if he is moved, there is still jurisdiction in this court to continue with the petition. So I suspect if they put him on Diego Garcia, which is about as far away from here as I can think right now, the jurisdiction would still lie according to the Supreme Court. So is that what your concern is about, moving him, or is it you-all's, as attorneys, access to him?

MR. DUNHAM: I believe we have jurisdiction over everybody we need to have jurisdiction over and they can't make this case disappear from this court the way they've tried to make Mr. Hamdi disappear. But the problem is that we wouldn't be able to see him. They could move him to a place that would be virtually impossible for counsel to have access

to him. I mean, if they moved him to Guantanamo Bay or if they moved him to Diego Garcia, as you posited, you know, we would have to travel to great extremes in order to see him. It would be an inconvenience to our office, it would be unwarranted expense to the United States, and it would also make matters difficult for the court if it needed to get the gentleman back here for testimony.

Now, I believe the court is well within its discretion and prerogative to order the United States at this point not to move the man and to let him see counsel. I have a national security clearance as high as I need to be involved in these matters at the present time, and I am willing to sign any protective order the United States proffers with regard to the content of any communication I receive from this gentleman. There can be absolutely no harm to the interests of the United States in letting him see a lawyer.

I mean, it's one of our fundamental rights, and he is a U.S. citizen. It just is one of the things that really depresses me that we have held this gentleman since January and we've held him in the eastern district since April 6th, and he's a U.S. citizen and he hasn't seen counsel. I don't know whether he's been told he has a right to that. I don't know what he's been told. Nobody has represented on behalf of the United States that we told him he could have a lawyer and he doesn't want one. So, Your Honor, I would request that if any

consideration is being given to giving the government more time, that it be coupled with an order that he not be moved and that we be allowed to see him.

MR. LEONARD: Your Honor, I note that Mr. Dunham has very artfully argued the merits of the petition in response to a simple request for an extension of time. I will state for the record that the fact that I did not comment on the specific allegations of the petition should not be regarded as any kind of acquiescence in those allegations. I make no representation one way or the other whether or not Mr. Hamdi is a United States citizen. That matter is still being investigated.

With respect to the right to counsel, surely Mr. Dunham cannot be claiming that enemy combatants seized on a field of battle are entitled to attorneys. Now, further discussion of that issue, again, is tied up in the merits of the petition.

The position of the respondents is simply that allowing a total of 30 days or an extension of 21 days, to thoroughly address those legal issues is not going to in any way interfere with Mr. Hamdi's further rights to articulate the merits of the defense or the merits of his habeas action and will certainly interfere with the government's abilities, specifically the military's ability, to deal with individual combatants that they have seized on the battlefield.

And finally, there's another issue with respect to

Mr. Dunham's request for access, and that has to do with whether or not the Public Defender was properly appointed as counsel in this case to begin with.

As the court's aware under 3006(a), only persons who are financially eligible, who shall demonstrate a financial need are entitled to counsel. My review of the file indicates that the only evidence proffered in support of that financial statement were two very short affidavits: one from an attorney in Qatar and one from Mr. Hamdi's father, neither of which were in the format of a traditional informa pauperis paperwork usually submitted in requests for counsel.

THE COURT: Well, then we will bring Mr. Hamdi here tomorrow or this afternoon, and I will put him under oath and find out if he's indigent. We can do that, you know, if that bothers you, and he will be subject to penalties of perjury.

This is an unusual case because you haven't let Mr. Dunham or anyone else talk to him.

MR. LEONARD: I understand.

THE COURT: So the petition was filed on the request of his father. The only information that was developed was on the financial ability -- I did not grant the appointment of Mr. Dunham's office until I had some information as to his financial eligibility. When I received that information, I couldn't figure out any other way to determine that financial eligibility without bringing Mr. Hamdi here. I didn't want to

do that until the government had been served and had a right to respond.

Now, if you are concerned about that issue, I'm sure the Marshals can have him here this afternoon and we can make a financial inquiry.

MR. LEONARD: Well, Your Honor, my view would be that the elder Mr. Hamdi was obligated to provide the type of financial information. After all, apparently, Mr. Dunham has been retained on his behalf through this attorney in Qatar.

THE COURT: I don't think Mr. Dunham has been retained. He's been appointed by this court.

MR. LEONARD: All right. But he was asked to be involved by this attorney in Qatar, and the case law is clear that on issues of financial eligibility, the financial resources of the family can be considered. But again, Your Honor, I would just go back to this whole issue of access to counsel and everything else is tied up in the merits of this action, the merits of the habeas petition, and a simple 21-day request for an extension of time is not going to unduly prejudice either side in order to get those issues before the court and then the court's exercise of restraint then determine whether or not it's appropriate to proceed further.

THE COURT: Mr. Leonard, one thing that puzzles me in your request for the extension of time is that, first off, this person was brought here at all, brought into the United States

at all. Someone either with the military Department of Defense, Department of Justice made the decision to bring him here. That someone I cannot imagine was not advised by counsel as to the fact that this petition, or something similar to this, might crop up to have a supposed U.S. citizen in this country in a military brig not charged civilianly, not charged by the military, because it can't most likely, and I guess my concern is did whoever made this decision to bring him here, did they have ineffective assistance of counsel, to use a term of art in the habeas field, on the part of the government that they now today don't know why they have him here or do not wish to make an answer already? That puzzles me that you are not in a position to make an answer as to why he's here.

MR. LEONARD: Your Honor, it's not a matter of not having a reason why Mr. Hamdi was brought to the Norfolk Naval Base. It's a matter of being able to articulate an effective and a thorough response to the allegations that are raised in the habeas petition.

THE COURT: And your representation -- how long have you been involved in the case since I entered the petition order last week?

MR. LEONARD: Only since the end of last week, Your Honor.

THE COURT: All right. And answer this, if you can: Is it your understanding, based on your client's information

that's been supplied to you, that the essence of the answer to the petition will be that Mr. Hamdi was an enemy combatant?

MR. LEONARD: Yes, Your Honor.

THE COURT: Motion is granted. I'm going to allow the motion of the United States to respond to this petition. I believe it would be June 13th. Is that the 30 days?

MR. LEONARD: Yes, Your Honor.

THE COURT: All right. June 13th.

Mr. Dunham, I'm going to also order the United States to allow you to have access to Mr. Hamdi within the next five days, and I don't know if Mr. Hamdi speaks English? Do you need an interpreter; do you know?

MR. LEONARD: I do not know, and I would hope the United States would advise me. If they don't, I may have to go back with an interpreter and would ask the court to rule on that now so we don't have to come back to court over whether I can take an interpreter with me.

THE COURT: Do you know whether he speaks English, Mr. Leonard?

MR. LEONARD: No, Your Honor, I don't.

THE COURT: You didn't get that information from his father or the attorney in Qatar?

MR. DUNHAM: No, I didn't. I don't have that information at the present time. It's quite possible I will need an interpreter. I am dealing with an Arabic interpreter

in another case that I'm in, so I believe I can get somebody who's acceptable to the U.S. to go with me if I need an interpreter.

THE COURT: All right. June 13th will be the due date from the United States. Any response from the Public Defender will be the 21st of June, and then after that I will issue such order as may be appropriate.

Mr. Leonard, your position may be he's an enemy combatant, but since he is a U.S. citizen in the custody of the military, I'm concerned about Fourth Amendment and Fifth Amendment potential violations, and maybe there are none. Maybe this habeas petition will go away, I don't know, but Mr. Dunham at least needs to speak to his client. And if there are protective orders that you wish him to sign, I notice Mr. Dunham was just appointed as Public Defender a little over a year ago. He had his FBI clearance within the last year -- probably more recent than you've had an FBI background check done -- and he should be cleared. I don't know what he's cleared for, but that's an issue that needs to be of concern.

And I don't know if any other members of your staff have had a clearance. So Mr. Shelton and Mr. Kamens, I don't know the hiring practice, whether they have to go through a full field investigation and have a clearance, but at this point I'm only authorizing someone with at least a top secret clearance to talk to Mr. Hamdi. And also if there's an

interpreter involved, the same thing would have to apply to that person.

MR. DUNHAM: Your Honor, on the top secret issue, I believe my clearance at the present time is secret, but it s adequate for the Moussoui case, and I can't imagine there's anything in Mr. Hamdi's situation that's more sensitive than what I'm dealing with in that matter.

THE COURT: Well, I'll let you and the U.S. attorney worry about your clearance level instead of me. That's an executive branch decision anyway.

Mr. Leonard?

MR. LEONARD: Your Honor, is your order authorizing Mr. Dunham to have access in the context that he's allowed to have private consultation, or are members of the military to be present?

THE COURT: He's allowed to have private consultation. Otherwise, he cannot represent him in this matter.

Mr. Dunham, one thing I want you to get into is the fella's financial assets too. If you find he's getting a hundred thousand a year from the Saudi government someplace, or Qatar government, you are to report that to me immediately, or anything short of any income.

MR. DUNHAM: That is a concern of mine. I do not want to waste my office's resources if he's got money. So

that's one of the first matters I want to take up with him. The other thing, Your Honor, is on the movement. Did you decide that they could move him, or could you hold him here until this matter is concluded?

THE COURT: Since we have jurisdiction over the case, I'm not going to raise that issue unless there is a movement, then you can come back in. If he's shipped off to Diego Garcia, then that's one thing. Guantanamo Bay, Cuba, we have cases up here all the time, or historically one or two a year from Guantanamo Bay where a civilian has committed manslaughter or rape or whatever in Guantanamo. Norfolk happens to be the first stop for the MAT flights from Guantanamo, so we frequently have those types of cases and I'm sure we could make arrangements to put you on a MAT flight which is back down to Guantanamo. It may not be the most pleasant accommodations, but that's been done many times.

All right. Anything further? I'm going to enter a short order reciting just what I've said.

MR. LEONARD: Nothing further, Your Honor.

THE COURT: And I'm not sure you have a right to appeal this. Let me just mention that, either side. You may under Rule 71, but Judge Clarke some years ago said in habeas proceedings he wanted the whole lot put together when it came up on appeal, all the motions, and I'm not sure that flies in this type of case, but you may want to take a look at whether

Rule 72 and its procedures apply to this type of thing or whether you have to address it in the objections to the Report and Recommendation. But I will let you worry about that. It will just give you one more thing to think about.

Court's in recess.

(Whereupon, this hearing concluded at 11:30 a.m.

* * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

x Sharon B. Borden x

Sharon B. Borden

x May 21, 2002 x

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI and FRANK W. DUNHAM, JR., as next friend of YASER ESAM HAMDI,	)	
Petitioners,	)	CIVIL ACTION
v.	)	NO. 2:02cv348
DONALD RUMSFELD, Secretary of Defense, and COMMANDER W. R. PAULETTE, Norfolk Naval Brig, Norfolk, Virginia,	)	
Respondents.	)	

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

May 29, 2002

Before: THE HONORABLE ROBERT G. DOUMAR
United States District Judge

COPY

Appearances:

FEDERAL PUBLIC DEFENDER
By: FRANK W. DUNHAM, JR., ESQUIRE
LARRY W. SHELTON, ESQUIRE
GEREMY C. KAMENS, ESQUIRE
Counsel for the Petitioners

DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
By: GREGORY GEORGE GARRE, ESQUIRE
and
UNITED STATES ATTORNEY'S OFFICE
By: LAWRENCE R. LEONARD, ESQUIRE
Assistant United States Attorney

have an evidentiary hearing in this matter, but it appears he cannot. It is not a post-conviction situation as I understand it. And the statute is clear, and the decisions -- the Supreme Court decisions in Wingo v. Wedding, which is 418 U.S. 461, which is a 1974 case, and I assume it referred to Holiday v. Johnston, which was a 1941 case, as to the power of the Magistrate, it would appear that unless it's a post-conviction relief that's sought that the evidentiary hearing must be conducted by a District Judge.

To the extent that I have entered an order indicating that the Magistrate Judge would hold such hearings, I feel that by further reviewing the statute that the hearings will be held before a District Judge if there is an evidentiary hearing; however, other matters may be referred to the Magistrate Judge for determination. Under the new Magistrate statute, 28 United States Code Section 636(b)(1), it only allows a Magistrate Judge to hear those matters affecting those matters concerning post-conviction matters. As far as I can tell, there is no pre-conviction. That does not mean that they would not have the jurisdiction to make an initial determination and to issue show cause orders; however, in order to make the record clear, and to arrive at a fair and just solution in this matter, it would appear that the Government would have to show cause why this gentleman is being held. And the order to show cause, I will

grant it until June the 11th.

Mr. Hamdi has filed what appears to be a pro se petition for relief also, through someone else, but, as I understand it, he's being held incommunicado, and, as the Courts have said, we can't be too technical about allowing the petitions to be filed. There is no question that the petition shall be filed.

To the extent that there may be any problem concerning the fact that the petition is filed, I'm ordering it filed in the interest of justice. The interest as is said in the case of Story v. The Commonwealth of Massachusetts, a 1901 case in the Supreme Court, they stated the interest of both the public and the petitioner require promptness, that if he is unlawfully restrained of his liberty it may be given to him as speedily as possible, that, if not, all having anything to do with his restraint be advised thereof and the mind of the public be put at rest. And, also, that a further action is to be taken in the matter it may be taken without delay.

It's clear there is no greater writ than that of the writ of habeas corpus nor can any person be held under our Constitution, be they alien or citizen, without due process of law under our Constitution.

So the question is why is this gentleman being held, and, if he's validly being held, then he may be held or

restrained. If the holding is not valid, then that may be a different situation. If he be an alien, the Constitution still applies to an alien. The individual is being held within the Eastern District of Virginia at the Norfolk Naval Station as I understand it.

I'll be glad to hear from you as to why an attorney cannot communicate with him, Mr. Leonard, or whomever desires to tell me why I can't issue such an order.

MR. LEONARD: Thank you, Your Honor. I would like to introduce to the Court Gregory Garre. He's with the Office of the Solicitor General of the Department of Justice. I have filed an application for his admission pro hac vice. He will be arguing on behalf of the respondents.

THE COURT: He is admitted. Let's proceed.

Why should this person be held incommunicado?

MR. GARRE: Thank you, Your Honor, for the opportunity to appear here.

The position of the respondents is that, first, of course, the Court lacks jurisdiction to enter any order in this case until it's determined that it has jurisdiction.

THE COURT: I just determined I have jurisdiction.

MR. GARRE: Okay.

THE COURT: Once that's determined, you may proceed from there. We all understand that this gentleman is being held. There is no question that he is incommunicado. He

can't speak with anyone. So consequently, how can anyone get to him, other than the fact that two petitions have been presented to this court for habeas corpus? Accordingly, this court, as the Supreme Court has said on several occasions, technical niceties are not to be such as to hinder a person from applying for a writ.

MR. GARRE: Yes, Your Honor. If I could make three points in response to that, hopefully it will clarify the situation.

THE COURT: All right.

MR. GARRE: First, a minor factual point. Mr. Hamdi does have access to the mail and can send letters out, so he's not being held incommunicado to that extent.

Secondly -- and this is another factual point which I think is significant. As the other detainee --

THE COURT: Have we got an affidavit to that effect?

MR. GARRE: I don't here, Your Honor.

THE COURT: I said do we have an affidavit to the effect that he's not being held incommunicado?

MR. GARRE: I'm sorry, Your Honor. We have not presented an affidavit. I think all of these issues we intend to address in response to the Court's show cause order.

THE COURT: The show cause order will be answered

on June the 13th.

MR. GARRE: Yes, Your Honor.

THE COURT: I want to make something else clear. On June the 13th, by 12:00 noon, so that we don't have any question about filing it at 5 o'clock in the afternoon.

MR. GARRE: Another minor factual point. It's just a point of the litigation that's going on in the District of Columbia where detainees held in the same situation or similar situations as Mr. Hamdi have had next friends since brought by direct family members. In this case, of course, we know the father has been in contact with the Public Defender, so the father would be the natural next friend in the typical situation. And there is no apparent reason that's been presented, in the papers at least, why he's not in a position to act as best next friend. And we also think for the reasons we set out, and I won't get back into them if Your Honor doesn't want to hear them today, that Mr. -- that the Public Defender in this case lacks authority to proceed as the next friend. So particularly where there is a next friend, there seems to be a parent, and, for all we know, available to play that role, we would urge the Court not to allow the case to proceed in the usual situation, in fact the unprecedented situation where the Public Defender is being appointed to act as the next friend to somebody that he has no relationship at all.

Now, if I could go back to the access to counsel issue, that issue is wrapped up inextricably with the question of whether or not the detainee, Mr. Hamdi, is being lawfully detained. As we intend to show in response to Your Honor's order, under the Laws and Customs of Wars enemy combatants, like Mr. Hamdi -- and we again intend to show that in our petition -- are entitled to be held --

THE COURT: Is he a combatant? Was he a combatant?

MR. GARRE: The United States military has determined that he is an enemy combatant. And we will fully address that in our show cause order, Your Honor. That issue is -- and we'll explain this in our response. That issue is tied directly --

THE COURT: That would go to the heart of the habeas matter itself, would it not?

MR. GARRE: It does, Your Honor. And importantly --

THE COURT: So that an evidentiary hearing would have to be necessary, not just I want to present a petition and say he's a combatant; is that correct?

MR. GARRE: Well, first of all, there would be the question of what factual issues are relevant to the determination whether he is an enemy combatant.

THE COURT: Was he a combatant? So is that a

factual issue?

MR. GARRE: That is a factual issue to the extent we maintain he is an enemy combatant. Significantly, the petition that's before this court now does not assert otherwise. So there is -- to the extent that it's a fact before the Court, it's not a disputed fact in the pleadings here. We do intend to address in our papers the question of Mr. Hamdi's status as an enemy combatant and the related question of to what extent the Court can inquire into that, what facts are necessary to make that determination, and if any evidentiary determination is necessary at all. Those issues are --

THE COURT: So the Court doesn't have the power to determine if he's a combatant or not? Is that what you're saying?

MR. GARRE: No, Your Honor.

THE COURT: You mean the United States -- let's say they picked up John Doe off the street. You can pick him up, throw him in the Navy Brig, and say he's a combatant, and the Court can't have any jurisdiction? Is that your position?

MR. GARRE: That's not the position of the United States.

THE COURT: Obviously it wouldn't be.

MR. GARRE: The United States is fully prepared to justify, to explain, the reasons why it's detaining Mr. Hamdi

as an enemy combatant in a properly filed habeas petition where those issues are before the Court.

In response to the Court's --

THE COURT: So you maintain it's not a properly filed petition? I'm going to make this clear, it's a properly filed petition. Now we go on from there.

MR. GARRE: The United States is prepared to respond -- the respondents are prepared to respond fully to the show cause order to explain why the military is lawfully holding Mr. Hamdi as an enemy combatant. We're not dealing with an individual who was picked up off the streets. We're dealing with an individual who the military has determined was seized in Afghanistan in an area of ongoing conflict as to --

THE COURT: Why did the Navy choose to treat him differently than the other detainees, where the other detainees are not on American soil, whereas this particular detainee supposedly is on American soil and is in this particular jurisdiction? The rest of them are not in the jurisdiction of any court that I know of, in the United States.

MR. GARRE: Well, certainly our position is that the military when it seizes enemy combatants has the authority and the discretion to determine where to hold those enemy combatants whether they're on American soil or in a

foreign land like the other detainees. That's a matter that's purely up to the military. It's not a --

THE COURT: So you contend he's a prisoner of war; is that correct?

MR. GARRE: No, Your Honor. Our position is he's an enemy combatant or an unlawful combatant, which is distinct.

THE COURT: What is an enemy combatant?

MR. GARRE: Again, Your Honor, I want to be able to answer your question without getting too deeply into the merits of the issues that are going to be the heart of the matter that's briefed before the Court.

THE COURT: My only problem with that is, as far as I know, there has been no declaration of war, has there?

MR. GARRE: Your Honor, there hasn't been a formal declaration of war.

THE COURT: There have been a lot of people who say we have a war, but I don't know if this is really a war or what is it.

MR. GARRE: Well, certainly our position is that the individual in this case was detained as an enemy combatant in connection with armed conflict and ongoing activities which have been characterized as a war effort as well as armed conflict, and that that determination, the authority of the military to seize people as enemy combatants

and hold them, is in no way dependent on a Congressional declaration or formal declaration of war.

THE COURT: If the Army then were to, let's say, go into parts of Virginia to root out criminals and someone opposed them, would they still have to be brought before a court or could the Army take care of those people and just throw them in the Brig?

MR. GARRE: Well, to be clear, again, Your Honor, the United States, although it objects to the particular filing in this case, we don't object to the notion that these individuals -- Mr. Hamdi can bring a proper habeas petition to challenge his custody. Now, the situation that Your Honor -- the hypothetical posed is quite different.

THE COURT: First, let me say this: The statute says that you have five days in order to answer. It can be extended until a maximum of 20 days. It can be extended. Do you not want it extended?

MR. GARRE: We're prepared to show --

THE COURT: Do you want to show cause in five days rather than June the 13th?

MR. GARRE: No, Your Honor. We appreciate the schedule that Your Honor has mapped out, and we're going to present --

THE COURT: I only patterned it after that which the Magistrate had patterned it, which would have been June

13th anyhow.

MR. GARRE: Right. We're prepared to show cause on that date. I think it's significant to note, we've noted this in our papers thus far, which haven't dealt with the merits at length, that we're not dealing with a novel doctrine here, the notion of holding enemy combatants. It's a doctrine that is recognized in the Laws and Customs of War. It's a doctrine that's been recognized --

THE COURT: There isn't any question it's recognized in the Customs of War, but I didn't know we had a war.

MR. GARRE: Well, Your Honor, we would address that in the papers, the extent to which the doctrine is applicable here. I don't know that the Public Defender, the attorney representing Mr. Hamdi or his next friend, has opposed the application the enemy combatant doctrine on that basis. He may well do so. We would be prepared to address that.

THE COURT: The question isn't what they have addressed. The question is whether he's legally being detained. That is the question. Whether they address the issue or don't address the issue, the issue still is is the gentleman being legally detained. And what causes it is the United States itself has said this particular gentleman we're treating in a different way than all the other detainees.

MR. GARRE: Well, Your Honor, he may be in a

different location, but he's not being treated in a different way. He's being held by the United States. The United States is involved in intelligence gathering efforts with respect to detainees, which are related directly to the ongoing conflict in Afghanistan as well as the broader effort the United States has undertaken in Operation Enduring Freedom. In that respect the detainee in this case is not in a different position than the other detainees. He's being held as an enemy combatant.

We agree with you the issue is whether or not he's being legally detained. And we will be prepared to show on June 13th fully addressing the merits of the doctrine which permits the military to hold an individual who's an enemy combatant, addressing why the individual in this case is properly regarded as a enemy combatant, and why this court can rule on that basis that he's lawfully detained.

The issue of whether or not he should be permitted access to counsel in advance of that is directly tied to the question of whether or not he's being lawfully detained. Our position is --

THE COURT: Let me ask you this question then: Assuming that he were an enemy combatant, then he would not be entitled to counsel; is that correct?

MR. GARRE: That's our position. He wouldn't be entitled to the type of counsel --

THE COURT: Is there a particular type of counsel that he's entitled to?

MR. GARRE: No, Your Honor. He would not --

THE COURT: He's not entitled to any counsel?

MR. GARRE: He would not be entitled to counsel to represent him challenging his confinement. And, again, that's important because of the reasons for which unlawful combatants or enemy combatants are held by the military, which is directly tied to the ongoing hostilities in connection which they were captured and seized.

The current situation where the Court leaves its stay order, its stay order in effect with respect to the Magistrate's access order or simply vacates that order, as we urge you to do, leaves the status quo in effect providing -- permitting access to counsel before any determination has been made, and even the issues have been fully briefed with respect to whether Mr. Hamdi is being lawfully detained, will dramatically disrupt the status quo, and we would submit could result in irreparable harm. The military intelligence gathering efforts are very important, dependent upon establishing a relationship of trust and dependence between the detainee and the questioners, and inserting a counsel between the detainee and the military authorities would directly disrupt that relationship, if not irreparably harm it. That's the customary situation where counsel are

inserted into that relationship. That is allowed under the enemy combatant doctrine in connection with those that have been seized and captured in connection with armed hostilities.

We urge the Court to provide the Government and the parties to fully address the question of whether Mr. Hamdi is being lawfully detained before the Court takes the unprecedented step of ordering access to counsel without having any determination of whether he's been lawfully detained. We think the expedited schedule would --

THE COURT: What you're saying is that, if I understand correctly, that an individual being detained by the military is not entitled to counsel, period; is that correct?

MR. GARRE: With this caveat, Your Honor: If he's --

THE COURT: What caveat?

MR. GARRE: If he's being lawfully detained.

THE COURT: If he's being lawfully detained? Let's assume it's a service personnel that's being detained. Is he entitled to counsel? I mean, now he's committed some crime. Is he entitled to counsel?

MR. GARRE: Your Honor, again, in this case we're dealing with enemy combatants.

THE COURT: Just answer it yes or no. Can you

answer it yes or no? Is a service person entitled to counsel who commits a crime?

MR. GARRE: Under the procedures in place, yes, and he's not being held as an enemy combatant, Your Honor.

THE COURT: All right. So if the person is an enemy combatant and he commits a crime, he's not entitled to counsel?

MR. GARRE: That's the position which --

THE COURT: So he could kill somebody, and you could try him and shoot him, and he still wouldn't be entitled to counsel?

MR. GARRE: I'm not sure I follow that hypothetical.

THE COURT: The hypothetical is this: Here is an enemy combatant. Okay. He shoots somebody at the Naval Base. Okay. Then you just -- they just say, okay, we're going to put him to death, he's not entitled to counsel; is that correct? He's an enemy combatant you said. He shot somebody. Now you can just go shoot him, can't you?

MR. GARRE: Our position is that he's being lawfully detained as an enemy combatant, and as part of that detention he's not entitled to access to counsel.

THE COURT: So he's not entitled to counsel no matter what he does?

I reduce it to an absurdity in order to find out

just what the position of the Government really is. Is it the position of the Government that under no circumstances an enemy combatant is entitled to counsel?

MR. GARRE: While he's being held as an enemy combatant in connection with the ongoing hostilities, yes. And we ask the Court for an opportunity --

THE COURT: When are these hostilities going to end? Is he going to be held forever? Can he be held for life?

MR. GARRE: We don't know when they're going to end. What we do know, Your Honor, is they're active and ongoing today. I don't think anyone disputes that or at least has disputed thus far. This situation is not different from the situation in which enemy combatants have been held before during time of hostilities. At some point there may be a question --

THE COURT: Give me an example.

MR. GARRE: Well, certainly one of the cases we cited in our footnote in a brief, the In re Territo case out of the Ninth Circuit, involved the holding of an American citizen as an enemy combatant in connection with World War II.

THE COURT: No question. That was a declaration of war, wasn't it?

MR. GARRE: There was a formal declaration in that

case. But, Your Honor, we would submit that that -- the application of that doctrine, which is a doctrine which arises not out of the way in which formal war is declared under the Constitution but, instead, under the Customs and Usages of War.

THE COURT: What's bothering me is that Congress has decided whether there is a war or not generally. Isn't that what the Constitution provides?

MR. GARRE: That's what the Constitution states with respect to formal war. Now --

THE COURT: You have informal -- we have informal war; is that it?

MR. GARRE: Certainly there have been numerous occasions --

THE COURT: So we have informal combatants; is that correct?

MR. GARRE: We have enemy combatants.

THE COURT: This is an informal enemy combatant?

MR. GARRE: No, Your Honor.

THE COURT: He'd be a formal combatant if a war was declared; is that correct?

MR. GARRE: That's certainly not our position, Your Honor. What we have here, our position is we have a full-fledged enemy combatant who was involved in hostilities ongoing today. We don't think the presence of a formally

declared war is necessary to --

THE COURT: Let me ask you, let's assume this particular person, I don't know what -- he happens to be Saudi Arabian, but let's assume he was an Afghanistan. Could you just pick up somebody off the streets of Afghanistan and say they're enemy combatants?

MR. GARRE: We could make that -- if that happened --

THE COURT: That determination is made by the military, and there is nobody that can change that determination?

MR. GARRE: No. We are prepared to show this court that Mr. Hamdi is an enemy combatant and to inform this court the considerations that are relevant to that determination, and that is part of --

THE COURT: So he was captured during a war engagement with the United States?

MR. GARRE: That's correct, Your Honor. And we're prepared to make that showing on June 13th and show why Mr. Hamdi is being unlawfully detained. And we urge the Court --

THE COURT: I'm not having an evidentiary hearing on the 13th. On the 20th at 2:00 p.m.

MR. GARRE: We think -- and we will explain this more in our papers, Your Honor -- it may not be necessary for the Court to undertake an evidentiary hearing. As I stated,

thus far the allegations in the petition don't contain an allegation that Mr. Hamdi is not an enemy combatant, so just on the papers that allegation doesn't exist. Now, if the Public Defender amends his petition, then that allegation would exist, but even then there would be the question of what the United States has to show to establish an enemy combatant status. That's something we intend to address in our papers. And we urge the Court before getting into questions of relief, questions which require the Court to find in essence that Mr. Hamdi is being unlawfully detained, that permits the Government to make that showing.

THE COURT: Did you -- in the Vietnam War did you -- were there any prisoners kept in the United States?

MR. GARRE: I believe that there were, Your Honor. I can't be accurate in my factual submission. That's my understanding. That's certainly something we could address in our show cause order. We don't think, to be clear, that the application of the doctrine is dependent on the presence of a formally declared war. Congress may not have formally declared a war. Of course, it has passed a law authorizing the use of military force. But to be clear, there have been numerous situations in our history where the United States has been involved in armed conflict in the absence of a formally or Congressionally declared war. And we think that the presence of a formal declaration is not required to the

application of the doctrine under which the United States is --

THE COURT: Let's go to the airports where we have military personnel now guarding the airports. I assume if the military personnel engaged in an altercation with an individual they could take that individual into custody and he would not be entitled to a writ of habeas corpus; is that correct? It would be a conflict. He would be a combatant. Is that correct? We're talking about a person going to catch an airplane. Maybe a buddy of yours might even ride the airplane, get angry with whomever the soldier was who was there. I see them there at the airports, don't you?

MR. GARRE: I certainly don't believe that would be correct, Your Honor.

THE COURT: But that's a combatant, isn't it?

MR. GARRE: No. Not in the way that the term is used under the existing doctrine.

THE COURT: So that it makes a difference as to what? What changes a person into a combatant who is an enemy?

MR. GARRE: Well, Your Honor, again, this is something we will explain in-depth in our show cause papers, and that has only been flagged briefly today. Certainly under the definition the Supreme Court relied upon in the Quirin case, and it's discussed in the In re Territo case,

the Ninth Circuit case cited in our papers, involves the taking up of arms or other belligerency against the United States. The respondents here are prepared to make that showing with Mr. Hamdi.

If I could just make clear another issue with respect to access to counsel. On one of the Court's hypotheticals it posed the situation where a detainee were actually charged with a crime. We don't dispute that if a detainee were charged with a crime then other rights might come into play which would entitle him to counsel. And that -- a similar situation arises in Mr. Walker Lindh who's being held in the Eastern District of Virginia who was provided with counsel after he was charged with crimes. So if and when a determination were made to charge Mr. Hamdi with a --

THE COURT: If you charge him with a crime, if somebody were to take a warrant out against Mr. Hamdi for any reason whatsoever, then it's your position that he could have counsel; is that correct?

MR. GARRE: That's the position. And that's what will happen --

THE COURT: What will make a difference?

MR. GARRE: There is a fundamental difference between individuals who are prosecuted through the civilian courts for --

THE COURT: Would he be less of an enemy combatant?

MR. GARRE: The United States, the President acting as Commander in Chief of the military, can make a determination from a number of different --

THE COURT: The President is the person that makes the decision here?

MR. GARRE: The military is making the determination. The President, of course, is ultimately, of course, the Commander in Chief. The military can make a determination from a number of different options and ways to hold enemy combatants, whether ultimately they should be charged with war crimes. The President has issued a military order which would provide for the designation of individuals who could be treated subject to that order.

Currently that order is not applicable to Mr. Hamdi, but it could be. It could be charged with civilian crimes. It could be repatriated. Currently we're dealing with individuals who have been detained in armed conflict, which is active and ongoing, and are being held as enemy combatants. And again I'm sorry to repeat myself, but we will be prepared to show why that detention is lawful, and why that detention is lawful without access to --

THE COURT: The only thing that creates a problem in this case is the fact that the United States chose to

treat Mr. Hamdi differently than the other detainees, which creates something of a differentiation between it and how it treats the other detainees.

MR. GARRE: Your Honor, I think the only --

THE COURT: Are the other detainees held in a similar type facility?

MR. GARRE: The other detainees are being held in a military facility. Now, it's off American soil, but that --

THE COURT: I understand that. Is it a similar type facility or is it -- is he being held in a prison-type facility or a jail or is he being held in a compound like the other detainees are being held?

MR. GARRE: Well, all the detainees that are relevant here are being confined, and they're --

THE COURT: I understand they're confined. I've asked you a particular question. Is this detainee confined in the same manner as the detainees in Guantanamo?

MR. GARRE: This detainee is confined in the Naval Brig here.

THE COURT: Naval Brig?

MR. GARRE: Yes.

THE COURT: My recollection is it has bars and cells; is that correct?

MR. GARRE: That's correct. And that's also true of the detainees who are being housed in Guantanamo.

THE COURT: They're not contained in sort of a camp then, like prisoners of war usually are detained?

MR. GARRE: These detainees are confined behind bars in a similar manner as Mr. Hamdi. And certainly our position is there is no distinction --

THE COURT: No distinction in the manner in which the confinement between Hamdi and the people in Guantanamo, and that's your position?

MR. GARRE: No distinction. Certainly no distinction that's relevant to the determination of whether or not Mr. Hamdi is being lawfully --

THE COURT: I'll decide what is relevant. I didn't ask you what was relevant. Understand my questions. So either you answer them directly or else we're dealing with different things. We're either dealing with apples or we're dealing with oranges. I want to deal with the same things you're dealing with. Now, my question is very frank. Is there a Brig on Guantanamo?

MR. GARRE: They're not being held in the Naval Brig on Guantanamo. They're being held in prison-like conditions, a similar --

THE COURT: They're being held in what would normally be termed a prisoner of war camp; is that correct?

MR. GARRE: I don't know that that is correct, Your Honor.

THE COURT: They're not being held -- they're being held differently than in a prisoner of war camp; is that correct?

MR. GARRE: I don't have personal familiarity with prisoner of war camps. What I do know is that the Guantanamo detainees are being held in cells. They are individually detained, and in that sense are being held in like manner as Mr. Hamdi.

THE COURT: So they are -- they're not in an area where they have access to one another; is that correct?

MR. GARRE: They're being held in a rudimentary cell block. I think there are varying degrees of access. They are being held in individual cells, though.

THE COURT: Do they have access to one another?

MR. GARRE: I believe that they have limited access to one another, although that certainly is --

THE COURT: Who does Mr. Hamdi have access to, besides the people who are holding him? Anyone?

MR. GARRE: Yes, Your Honor.

THE COURT: Who?

MR. GARRE: Mr. Hamdi has access to government officials. He has access to the International Committee for the Red Cross. And he has limited mail privileges.

THE COURT: So the International Committee for the Red Cross. And who was that person who has had access to

him? Have you got a name?

MR. GARRE: I don't have a name. My understanding is that he has met with an individual from the ICRC, the International Committee for the Red Cross. And we can try to obtain that name.

THE COURT: Furnish that name to the Court, please, and the date when that person had access to him.

MR. GARRE: We'll get that information, Your Honor.

THE COURT: All right. And furnish it before June the 13th, as promptly as possible.

Let's go ahead from there.

MR. GARRE: Thank you, Your Honor.

THE COURT: So what you're saying is that since he is a combatant, no matter who or what he may be, then he can be held incommunicado; is that correct, other than somebody from the International Red Cross can come to see him occasionally? Does he get packages from the International Red Cross?

MR. GARRE: He -- I don't believe he has received packages from the International Red Cross. I can try to verify that.

THE COURT: How about packages from home?

MR. GARRE: I don't believe he's received packages. But that is our position, Your Honor. And even more fundamentally --

THE COURT: Even in wartime the Red Cross used to give packages to prisoners of war.

MR. GARRE: That is our position. And even more fundamentally we ask the Court for an opportunity to explain to the Court in-depth why that is true. Certainly these are extraordinarily important issues that have very important critical national security concerns. And we're asking the Court for an opportunity to explore those. The papers that are before the Court are addressed to the jurisdictional issues.

THE COURT: I've already settled the jurisdictional issue. He's out there. He's being held. And he's asked for his constitutional right to determine why he's being held. And I'm going to make the Government explain why he's being held. And so far the only explanation I have is that he was an enemy combatant and that as an enemy combatant he's not entitled to counsel, he's not entitled to anything except a determination as to whether or not he's an enemy combatant. But on that issue he has no right to have a counsel according to the Government; is that correct?

MR. GARRE: The Government would like an opportunity to make that showing fully briefed with any necessary additional support.

THE COURT: You think that's fair and just? The United States feels that under its Constitution it's fair and

just that a person may be typed an enemy combatant no matter who or what they are, whether they are a citizen of the United States or somewhere else, and as such he's not entitled to counsel; is that correct?

MR. GARRE: That, Your Honor -- our position is that they may be held consistent with the Laws and Customs of War which courts have recognized.

THE COURT: Every time I raise one of these absurdities, and I raise them because they are absurd and nobody would ever believe that that could be the case, but, if your position is correct, that absurdity would be the case. Think about it a minute.

MR. GARRE: Your Honor, it wouldn't be because we are prepared to explain why this person is being held as an enemy combatant.

THE COURT: Is not entitled to counsel. Whether he's a combatant or non-combatant, I want to know why he is not entitled to counsel.

MR. GARRE: Well, again, that goes to the doctrine which we believe entitles the military to hold people without access to counsel. I mean, we're talking about people who have been captured in connection with hostilities. Now --

THE COURT: Do you have any case in which a person was held without the right of counsel?

MR. GARRE: We have cases which we've cited, and

again we'll provide the Court with more support. We would refer the Court to the Territo case and the Quirin case. Those cases weren't addressed to the threshold issue that is now before the Court of whether or not they could be held without access to counsel before any determination had been made as to whether or not they were properly regarded as enemy combatants and any determination had been made as to whether or not they be held as enemy combatants. If I could --

THE COURT: It just seems to run counter to the very basic right of counsel that is part of our Constitution, isn't it?

MR. GARRE: Certainly if this were a situation where someone had been charged with a civil crime and were going to be prosecuted for civil offenses, then constitutional rights, with which the Court is well familiar, would be directly --

THE COURT: If he were facing, let's say, a sentence of up to one year imprisonment, he would be entitled to counsel; is that correct?

MR. GARRE: If he were going to be tried in the civilian courts, yes, that is correct, Your Honor. We're dealing with --

THE COURT: Even in a military court. Let's take a military court. If he were going to be sentenced up to a

year imprisonment, would he be entitled to counsel?

MR. GARRE: Under the President's military order, if he were being subject to that order he would be provided with counsel.

THE COURT: He would have counsel?

MR. GARRE: Again, we're dealing with individuals who are in a different category, Your Honor, who are captured as enemy combatants. Certainly it would be anomalous for the Court to conclude that someone that has been captured on a field of battle would be entitled to counsel while being held by military authorities. Our position is this situation --

THE COURT: Normally that wouldn't be the case. The United States has chosen to have this particular individual treated differently from all the other detainees.

MR. GARRE: Only insofar as where he is located, not insofar as any other matter which is pertinent to the way he's being detained.

THE COURT: Well, he certainly doesn't have access to any other detainee, does he?

MR. GARRE: There is no other detainee being held at the Naval Brig. But that's not -- the access of other detainees is not a challenge that detainees have made. To the extent detainees -- the detainee here or detainees elsewhere are challenging their confinement, it's the same legal issue with respect to the authority of the United

States or the military to hold them.

THE COURT: Why would it be the same? I don't have any jurisdiction over Guantanamo. Neither does any other court, that I know of, have any jurisdiction of Guantanamo. When a crime has been committed in Guantanamo, it's wherever they fly into the United States. That particular place of location is the -- where the particular matter would be heard.

MR. GARRE: That's correct, Your Honor, but the cases like In re Territo and the Ex parte Quirin dealt with situations where the courts did determine they had jurisdiction to determine whether or not someone was being lawfully held as enemy combatants. So to that extent this case is no different.

The jurisdictional arguments that are being made with respect to detainees in Guantanamo don't apply here, but the other cases which we've cited and which we intend to explain and flesh out in our papers address the merits of why he's being lawfully detained do deal with similar situations.

THE COURT: The whole thing that's bothering me is the right of access to counsel. You may be perfectly justified in detaining this individual, and it may even be the best thing under the circumstances; however, the question really is I'm concerned that he should be held, in essence that the only person that can speak to him outside of those

persons who are his captors are the International Red Cross representative who paid him a visit, I assume, some -- one time or other.

MR. GARRE: I --

THE COURT: How long has he been held?

MR. GARRE: I don't have the exact date. I know the petition in this case, the Government received notice of that a couple weeks ago. I believe he has been held some time since the fall. I don't have the exact date. That's something we could address in our response.

Important for the Court to consider are the national security issues which come into play with respect to not only --

THE COURT: They may indeed override that. And that's an interesting point. What you're saying is national security interest in essence -- Congress certainly in times of grave danger under the Constitution have the right to suspend the writ of habeas corpus. Have they done it?

MR. GARRE: I believe there may have been a challenge of whether or not President Lincoln did it during the Civil War, but I don't believe that Congress has done it. We're not involved in that situation here.

THE COURT: The writ of habeas corpus still exists?

MR. GARRE: It does, Your Honor. That's why we're

prepared to show --

THE COURT: If it exists, then why shouldn't it exist for this individual unless Congress has done something concerning it?

MR. GARRE: To the extent the Court has determined it has jurisdiction to proceed, so we are prepared to respond to the writ of habeas -- the petition of habeas corpus.

THE COURT: I'm not granting any writ. I'm merely issuing a show cause order. Make that abundantly clear.

MR. GARRE: We're not maintaining -- this court has found jurisdiction. To the extent it's found that we're not maintaining, we don't have to respond to this. We're responding to the habeas petition and prepared to explain fully why he's being lawfully detained. We think deciding the counsel issue first would put the cart before the horse, and it would do so in a way that would gravely implicate national security interests. Inserting the lawyer between the detainee and the military could disrupt important intelligence gathering efforts that have been underway. And before the Court takes what would be in this case an unprecedented step, we ask the Court to give the Government an opportunity to fully brief, the parties an opportunity to fully brief, why this individual is being lawfully detained as an enemy combatant.

THE COURT: All right. I think I understand your

position.

Let me hear from Mr. Dunham.

MR. GARRE: Thank you, Your Honor.

THE COURT: All right, Mr. Dunham. Why should you be entitled to talk to this man who's being detained out at the Naval Base? They say he's a prisoner of war.

MR. DUNHAM: Well, let me go back to the question that I think hangs over this entire proceeding is why is Mr. Hamdi here in Norfolk instead of down in Guantanamo.

THE COURT: I'm trying to figure that out too, Mr. Dunham. I wish he were back in Guantanamo, and I wouldn't have the problem. But we've got the problem. Go ahead.

MR. DUNHAM: It's my problem too, Your Honor. And I -- you know, I think it goes back to the Executive orders that President Bush entered in connection with the so-called war on terrorism in which he singled out American citizens and said they were not subject to the Executive order. And Mr. Hamdi happens to be an American citizen, and so he can't be tried in the military tribunal, and he can't be rounded up the way other people may be able to be rounded up in connection with this matter.

And we -- he's not the only one that's been singled out like this. There is a case in this court up in the Alexandria Division, John Walker Lindh, who was apprehended on the battlefield, and has been charged, and has counsel.

THE COURT: He's entitled to counsel because they're charging him with some crime.

MR. DUNHAM: They charged him with some crime.

THE COURT: They don't charge this fellow with a crime, they can hold him incommunicado is what they're saying.

MR. DUNHAM: Indefinitely according to them, for life, as long as they're chasing al Qaida around the earth, they can hold this guy forever under their theory and he will never see counsel.

THE COURT: Well, Mr. Dunham, why is he entitled to your services? That's a horse of a different color.

MR. DUNHAM: Let me make one more small point, Your Honor, and then I'll answer your question very directly.

THE COURT: All right.

MR. DUNHAM: I asked the U. S. Attorney if he would promise that this man would not be prosecuted civilly, charged with a crime, and I got no assurance that he would not be. Now, so here we have a situation where I asked him, you know, it would affect my view of this thing greatly if you told me you were not going to prosecute him and --

THE COURT: What difference does that make? If they're going to prosecute him, if they even said they might prosecute him, if they said they might prosecute him, he would be entitled to a hearing.

MR. DUNHAM: That's correct, because he's being held and because he's being --

THE COURT: He would be entitled to counsel.

MR. DUNHAM: He's being interrogated, Your Honor. One of the big debates in the John Walker Lindh case up in Alexandria was the interrogation that went on by the military before they charged him. And during that period of time, their argument was he's not entitled to counsel because the military is holding him. Now, in that very case they want to use the statements that he made to the military against him in the prosecution.

Now, any good lawyer worth his salt if his lawyer was down at the jailhouse and they gave him the Miranda warning and he said I wanted my lawyer; well, the lawyer is going to go down there and talk to the man, and he's going to give him advice as to how to handle the interrogation. That is the overarching problem we have here.

The specific question Your Honor asked is why is he entitled to my assistance. Well, he's entitled to my assistance because the Court has determined in the interest of justice that a 2241 petition was filed, and 18 U.S.C. 3006(a) --

THE COURT: Don't forget there were two petitions filed, one by his next friend and one in evidently pro se.

MR. DUNHAM: I was unaware of the pro se petition.

THE COURT: Well, it's there.

MR. DUNHAM: Well, there is two filed. Why is he entitled to -- he's only entitled to my services because we've presented evidence to the Court of his indigency, that 18 U.S.C. 3006(a)(2)(b) permits the Court in its discretion in the interest of justice to appoint counsel to a 2241 petitioner who is indigent.

Now, my view is you just might as well write 18 U.S.C. 3006(a) out of the law. That's the statute that authorizes the Court to appoint counsel. If you're going to say, well, we're going to appoint you but you can't talk to your client, I mean, that is as absurd as some of the positions you advanced to Government counsel as, oh, yeah, we've got the authority to appoint you but we haven't got the authority to tell you you can go see this gentleman.

Now, the Government continually argues during the course of its presentation, Your Honor, we're going to show you, we're going to demonstrate to you, he's an unlawful combatant. Well, I think there is frequently two sides to a story. He may take the position, no, no, I was standing there tending to my camel when a bunch of guys came and rounded me up and said you're arrested, you're in the custody of the U. S. military.

I think he's entitled to any hearing that this court has to present his side of this thing. And it may

not -- it may differ from the military. I'm sorry, but they're not the arbiters of truth. The Court has to determine what's true. I don't know how the Court makes such a determination if it doesn't hear Mr. Hamdi's side of this thing. And I don't know how it hears Mr. Hamdi's side of this thing if he can't communicate with his lawyer who's going to present the case for him.

So from that standpoint it just seems to me that the argument, I know it's inconvenient for the Government, I know that they don't like to have inconvenient precedents set, but it just seems to me inherent in the Court's power to appoint me is the Court's power to say, and, Mr. Dunham, I want you to talk to this man and I want you to get his side of this thing so that when we have the hearing on June 20th we don't have to just listen to some affidavits from the Government about how he is a combatant, formal or informal, lawful or unlawful, and, hey, there is no evidence to dispute this because now can there be if I can't talk to this gentleman.

Now, they make the point that, well, the International Red Cross saw him, could have written, but this man speaks mostly Arabic, broken English. I understand I will be able to communicate with him in a very, very fundamental level. The Magistrate had ordered if I had a problem communicating with him I could take an interpreter

with me to help me. I would ask the Court to allow me to do that so we can have a full development of the facts and not just a one-sided hearing. I can't imagine what harm there is to the Government in letting the man talk to a lawyer. I haven't heard a cogent explanation of it other than that somehow the lawyer going in there will interfere with an interrogation, which, if I'm correct, has been going on now for nine months, because they say they picked him up last fall. He's been in Norfolk since April the 6th. He was brought here only, I'm convinced, because he's an American citizen and because they recognize that the Executive orders issued by the President don't cover him. And I believe that he -- that they either have got to charge him or set him free. That's our position. But in the meantime I want to find out.

THE COURT: They don't necessarily have to set him free. They have to return him to his country.

MR. DUNHAM: His country is the United States. He's a U. S. citizen. And --

THE COURT: Now, just because he's born here doesn't mean he's a U. S. citizen.

MR. DUNHAM: Unless he's renounced it.

THE COURT: He has a right to elect at a certain time. I think it's above 18, isn't it? Am I incorrect?

MR. DUNHAM: My --

THE COURT: He can elect to be a Saudi citizen if he's a Saudi Arabian he can elect to be a United States citizen, can't he?

MR. DUNHAM: My information is that he has made no election, from his family. From talking to his family, he's made no election. In the absence of an election, it would seem to me his place of birth would control. But setting all that aside, because the cases we've looked at don't seem to distinguish between whether you are a citizen or non-citizen, they turn largely on, first off, if you're on U. S. soil. Now, when you read Ex parte Quirin, the case referred to by counsel, it gets all the way up to the Supreme Court. And there are stipulations of complicated fact in that case, and there is counsel. There is no way in my judgment that -- there is nothing in that case to suggest that counsel in In re Quirin could not talk to the German saboteurs that came ashore here in the '40s to do bad things. It's clear they had counsel, that they were well-represented, that the facts in the case were developed. They couldn't have been developed any other way than counsel having access to them. There you have a formally declared war, saboteurs coming into the country off of a submarine. I mean, it just boggles my mind that the Government here takes the position that counsel can't see this man.

And I think, Your Honor -- I don't think there were

any problems with the way the petition was filed as next friend, but I think Your Honor, by the action you have taken has eliminated all those technical niceties.

THE COURT: What I have done is I've combined the pro se petition with the petition you filed, and therefore whatever it is we have two petitions pending, and, consequently, in both petitions I'm ordering that the United States answer or show cause by a written reply on or before June 13th at 12:00 noon. Now, we've settled that point.

The question not settled is the question of whether or not I have the right to appoint counsel or whether the Court has the right to appoint counsel for the individual who is facing continued incarceration.

MR. DUNHAM: I think the presumption has to be that the Court does because the statute authorizes the Court to appoint counsel. The Government has not shown the Court any case in which it said that when there was a proper habeas corpus petition filed in the Court that the petitioner could not have access to counsel. There is no such case that so holds. And the presumption against an incommunicado holdant, which is a constitutional anathema, the idea we have somebody here in Norfolk that's being held by the U. S. Government, that has no charges pending against him, that it cannot have counsel, is so mind-boggling it would seem to me the Government should be able to present some pretty clear case

law saying that he can't have access to counsel. The -- because all of the cases that deal with this. I mean, Ex parte Milligan, Yamashita, Quirin, they all obviously had counsel. There is not a mention of any of those cases that, oh, yeah, but you can't talk to your client, which, to me, is a fundamental -- if he can have counsel, then counsel -- access to counsel is inherent in all of that, you might as well not have counsel.

I could go over there, Your Honor -- as I speculated at the preliminary hearing, I could go over to the Brig, I could talk to this man for five minutes.

THE COURT: You can't even get in, Mr. Dunham. Don't worry.

MR. DUNHAM: Without your help. Without your help, I know.

THE COURT: Your chances of getting in there are between slim and none. You couldn't even get a marshal in there as I understand it.

MR. DUNHAM: My problem is not with getting in. It may be with getting out.

THE COURT: No. They wouldn't do that to you, Mr. Dunham.

MR. DUNHAM: But the problem that I --

THE COURT: Send Larry Shelton, and then you wouldn't have to worry about it.

MR. DUNHAM: I would like to be able to send Larry.

The problem that I see with all this is you don't have counsel if you don't have access to counsel. It's like not having it. And so when the Congress passed 3006(a) they didn't say you have, you know, 2241, you can appoint counsel but you can't have the counsel see the man if it's an unlawful enemy declared -- in an undeclared war, rounded up somewhere in Afghanistan. They didn't put that exception in there. And I can't imagine any court saying --

THE COURT: Well, what we have is a question of -- the issue is whether the gentleman is a combatant and whether he's being properly held as a combatant under some authority of Congress or the United States or the Executive, whatever power it is. Somewhere he's got to have some authority for holding this particular individual, I would assume.

MR. DUNHAM: But that's --

THE COURT: That determination has to be made. It's a question of whether it exists or not; isn't that correct?

MR. DUNHAM: That's correct. But whether he's a combatant or not is a question of fact. It could be. It could be a mixed question of fact and law. But there is -- you know, because they label him a combatant doesn't make him so. He's got a right to say, hey, I wasn't a combatant; what

are you talking about?

THE COURT: He may be. Why else would they have picked him up?

MR. DUNHAM: They round up -- you know, we presented to the Court the news reports of 33 Kuwaitis over there doing charitable work and got rounded up and sent to Guantanamo.

THE COURT: They say they were doing charity work. You know, charity takes many forms. It takes a lot of forms, Mr. Dunham.

MR. DUNHAM: That's correct.

THE COURT: I have noticed a lot of people think they're doing charity when the opposite result is achieved, you know.

MR. DUNHAM: It also may make a difference who he's affiliated with, whether he's affiliated with al Qaida or Taliban. If he's affiliated with Taliban, that thing is over. There is a new government. The Taliban is gone, surrendered. Even if you have an informal war, that's over.

There is a whole lot of questions that may -- factual issues that may bear on this thing. And what I'm basically urging the Court to do is to allow me to see him so I can develop his side of the facts. And guess what? It's quite possible that this man could tell me, look, you're a Christian infidel, I don't want to talk to you, I don't know

why you filed this petition for me. I'm not interested. I could come back and save everybody a lot of trouble. And it doesn't seem --

THE COURT: I just don't believe that's going to happen, Mr. Dunham. Somehow or another I just don't think that's going to happen.

MR. DUNHAM: But I do think, Your Honor, to proceed with a hearing in the case without me having talked to my client is not giving him the relief that all of the statutes and all of the history of the cases in this area suggest he's entitled to.

THE COURT: Well, I understand your position, Mr. Dunham.

All right. Mr. Garre -- is it Garre?

MR. GARRE: Your Honor --

THE COURT: What do you have to say about what Mr. Dunham is saying? He's saying in essence it's extremely difficult for a person to engage in any legal transaction or situation without counsel. And, indeed, it seems to me that it would be beneficial to all concerned.

MR. GARRE: Several things, Your Honor.

THE COURT: All right.

MR. GARRE: First of all, we think that we should -- we would ask the Court for an opportunity to present the showing to this court why we believe -- we have

determined Mr. Hamdi is an enemy combatant and we can lawfully hold him. The types of arguments that Mr. Dunnam is making now --

THE COURT: One of the questions he raised I think, is a very good question. Do you have any case anywhere where any person who brought a writ was denied the right to counsel? Do you have any case anywhere?

MR. GARRE: We will be making -- I can't cite to you --

THE COURT: Since the Magna Carta have you heard of such a case? Maybe you've got one somewhere back in the 13th Century.

MR. GARRE: Certainly the cases which involved situations where enemy combatants are being held -- the Quirin case Mr. Dunham mentioned that involved a case where charges have been brought against an individual so that it did involve a case where --

THE COURT: If you don't ever bring charges you can hold him forever? Is that it?

MR. GARRE: Our position is we can hold him consistent with the doctrine I have discussed and that we'll explain to the Court. It s not a situation --

THE COURT: But I'm having some problems. I'm merely asking you about counsel. You are saying if he's charged with a crime that would jail him he's entitled to

counsel. If we don't charge him with a crime we can keep him in jail forever. That sounds idiotic, doesn't it?

MR. GARRE: There has been no assertion Mr. Hamdi or any of the other detainees are going to be held in jail indefinitely. They are being held --

THE COURT: Is he being held for one month, two months? Is it six months? Is it six years? How much time? He's been there now long? He's been there since from -- you said from the fall. He's been there over six months. If he were charged in this country with anything to put him in jail for six months would require counsel.

MR. GARRE: Your Honor, there have been countless individuals who have been held as enemy combatants or as prisoners of war who have not been provided access to counsel.

THE COURT: I totally agree with you.

MR. GARRE: Although Mr. Dunham says there is no case -- the proposition counsel should not be entitled to access, there is not a single case we're aware of that the Court ordered an enemy combatant be provided access to a counsel while he's being held to --

THE COURT: There is going to be a first time, isn't there? Always a first time.

MR. GARRE: The moment access is granted to counsel, Your Honor, it irreparably affects the relationship

and the reasons for which Mr. Hamdi is being held.

THE COURT: You mean in six months you all haven't been able to interrogate him? You know, somebody lost their ability to communicate or something?

MR. GARRE: It involves an ongoing process. Mr. Hamdi has been involved in that process.

THE COURT: How long does it take to interrogate someone?

MR. GARRE: It can vary based on the individual. What's important is to establish the relationship between the questioner and the detainee, the relationship of trust and dependence. The moment counsel is inserted in between the questioner and those who detain him, that relationship is destroyed. You can't go back on that. And before the Court orders that that kind of access be provided, we ask that at a minimum the Government be able to show the full -- to fully address the issue.

THE COURT: I tell you what I'm going to do. I'm going to order it. I'm going to order it. How much time do you want to go to the Supreme Court or any other court that says this person isn't entitled to counsel? How much time do you want?

MR. GARRE: Well --

THE COURT: Do you want 24 hours, 48 hours, or 72 hours?

MR. GARRE: Well, we would ask --

THE COURT: How much time do you want to go to any judge anywhere in any higher court to tell me that a man is not entitled to counsel in a case pending in this court?

MR. GARRE: Your Honor, we would ask that the Court give us sufficient time to make that determination.

THE COURT: All right. I'll give you sufficient time. How long does it take for you to get to Richmond or to Washington, D. C.? Tell me. How long does it take for you to print a petition? Because this person is going to be entitled to counsel in this court. But I'm going to give you a right to go to any judge in the Circuit Court or the United States Supreme Court and say that Hamdi is not entitled to counsel in a habeas petition filed in this court.

MR. GARRE: Your Honor, we would ask to have the 72-hour period --

THE COURT: You get a 72-hour period.

MR. GARRE: -- to evaluate --

THE COURT: 72 hours from now, without any other court order overruling it, Mr. Dunham, you will interview, you or Mr. Shelton, will -- one or the other, no double cases -- one or the other will interview Mr. Hamdi, if he desires to be interviewed after you explain who you are. You have 72 hours from this moment on. And, regardless of anything else, you have 72 hours from now you can walk into

that United States Naval Brig.

MR. GARRE: Your Honor --

THE COURT: I am ordering the United States to allow access to Mr. Dunham or Mr. Shelton, one or the other, with an interpreter to interview Mr. Hamdi.

MR. GARRE: Your Honor --

THE COURT: 72 hours from now.

MR. GARRE: If I could make one request which is related to that. If you would permit the parties to try to agree to a special administrative order involving access to counsel. In any other situation in which counsel is provided access to someone who is being detained in connection with the types of activities in which Mr. Hamdi is being detained, courts have entered a special administrative order governing the conditions under which communications take place, the range of subjects, the presence of interpreters. If Your Honor would allow the parties to --

THE COURT: I'm going to allow him access to Mr. Hamdi, as any lawyer would have access to his client, in private, in private, with an interpreter; however, he will be under guard, of course. I'm not saying -- they will be in some position that's in private, with no listening device by any party or person of the United States or any other party. No recording of any kind will be taken. His communication with counsel will be private. So that we understand that. I

don't want any tapes, any hidden microphones, anything, period.

MR. GARRE: If I understand Your Honor --

THE COURT: 72 hours from now.

You can go up. Maybe you can find a judge that says the man is not entitled to counsel in a writ of habeas corpus. We're in a new situation in the United States.

MR. GARRE: But if the Court would allow us to submit a paper to allow us to try to agree to arrangements with the Public Defender and submit the type of special administrative order which is approved by the Court, which is in place in any other situation in which someone like Mr. Hamdi who has been charged with a crime is provided access to counsel, those sorts of things are spelled out in advance under the order which is approved by the Court, so that there is no confusion about the conditions that take place. And we could try to work that out with Mr. Dunham, and, if need be, get something to the Court later today or tomorrow morning, so that we have that opportunity to make those conditions absolutely clear.

THE COURT: I don't mind you working out something that arrives at --

MR. DUNHAM: I'm pleased to work with him on something like that, Your Honor.

THE COURT: I'm not interested in that. I'm

interested in the fact we have a case pending, and I feel that the individual concerned has a right to counsel. That's all I'm saying. And I do think in any case which a person is being held he has a right to counsel.

The question that is here is a question of fundamental justice. Is he being properly held? Why was he brought here? Does this particular Executive order pertain to him or is there some other order that pertains to him? What authority is he being held under? And if we have the appropriate authority there is no problem. But he still has a right to counsel, and, consequently, I'm affording him that right, and he will have it within 72 hours.

Now, if you work out something, I'm not making it any less or longer or anything, because I want to give him ample opportunity to be able to answer and to obtain information that may answer whatever you may file on the 13th. And if Mr. Dunham needs extra time, we may be able to arrange that also. But the fact of the matter is that on the 13th you have to show cause why the gentleman is being held.

MR. GARRE: Yes, Your Honor. We fully intend to do so.

THE COURT: If you can work out an order I'm happy to have it, but I want it today, end of the day. 5 o'clock is fine. If you can have it by 5 o'clock, I'll be glad to enter it. I'm not trying to rush you. But it's not going to

be more than 72 hours from now. 72 hours from 1:00 p.m. today. So where does that make it? 72 hours is three days, right?

MR. GARRE: Yes, Your Honor.

THE COURT: So you're going to have to allow him in. I'm giving you 72 hours because maybe you can find some judge that will say he's not entitled to counsel. If you can, more power to you then. I think there are 10 Circuit Court Judges, nine Supreme Court Justices. All you have to do is find one of them. You may be able to figure out -- out of all those people you may be able to figure out -- is it more than -- 11, 12 maybe, Circuit Court Judges. 12 now. So you can add all those together. If you find anyone that says he's not entitled to counsel, that's fine, set aside my order and stay it, okay?

MR. GARRE: Your Honor, I believe the 72 hours would fall on 1:00 p.m. on Saturday.

THE COURT: Well, those guys work on Saturday too.

MR. GARRE: Okay, Your Honor.

THE COURT: You will find for this thing they'll work on Saturday. If you can't find one by Friday that will set aside this order, you aren't going to find one.

MR. GARRE: Yes, Your Honor. Thank you very much for allowing me to appear.

THE COURT: Anything else?

MR. DUNHAM: No, Your Honor.

THE COURT: See if you can work that order out. We'll recess.

(Proceedings were concluded at 1:40 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Penny Commander Wile, RMR

Date

U.S. Treaties on LEXIS

MULTILATERAL

PROTECTION OF WAR VICTIMS: Prisoners of War

TIAS 3364

6 U.S.T. 3316; 1949 U.S.T. LEXIS 483

August 12, 1949, Date-Signed

February 2, 1956, Date-In-Force

STATUS:

[*1] Convention, with annexes, dated at Geneva August 12, 1949.
Ratification advised by the Senate of the United States of America, subject to a statement, July 6, 1955;
Ratified by the President of the United States of America, subject to said statement, July 14, 1955;
Ratification of the United States of America deposited with the Swiss Federal Council August 2, 1955;
Proclaimed by the President of the United States of America August 30, 1955;
Date of entry into force with respect to the United States of America: February 2, 1956.

CONVENTION DE GENEVE RELATIVE AU TRAITEMENT DES PRISONNIERS DE GUERRE DU 12 AOUT 1949
GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF AUGUST 12, 1949
RESERVES FAITES A L'OCCASION DE LA SIGNATURE DES CONVENTIONS DE GENEVE DU 12 AOUT 1949 POUR LA PROTECTION DES VICTIMES DE LA GUERRE
RESERVATIONS MADE AT THE TIME OF SIGNATURE OF THE GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS OF AUGUST 12, 1949

TEXT

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Geneva Convention relative to the Treatment of Prisoners of War was open for signature from August 12, 1949 until February 12, 1950, and during that period was signed on [*2] behalf of the United States of America and sixty other States;

WHEREAS the text of the said Convention, in the English and French languages, as certified by the Swiss Federal Council, is word for word as follows:

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Convention concluded at Geneva on July 27, 1929, relative to the Treatment of Prisoners of War, have agreed as follows:

PART I

GENERAL PROVISIONS

ARTICLE 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

ARTICLE 2

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not [*3] be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

ARTICLE 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: -

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal [*4] dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

ARTICLE 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
(2) Members of other militias and members of other volunteer corps, including those of organized [*5] resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.
(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, [*6] of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by [*7] neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations

exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

ARTICLE 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed [*8] a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

ARTICLE 6

In addition to the agreements expressly provided for in Articles 10, 23, 28, 33, 60, 65, 66, 67, 72, 73, 75, 109, 110, 118, 119, 122 and 132, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them.

Prisoners of war shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

ARTICLE 7

Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by [*9] the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

ARTICLE 8

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

ARTICLE 9

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian [*10] organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.

ARTICLE 10

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When prisoners of war do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned [*11] or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

ARTICLE 11

In cases where they deem it advisable in the interest of protected persons particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, [*12] each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for prisoners of war, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

PART II

GENERAL PROTECTION OF PRISONERS OF WAR

ARTICLE 12

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When [*13] prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

ARTICLE 13

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults [*14] and public curiosity.

Measures of reprisal against prisoners of war are prohibited.

ARTICLE 14

Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.

Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires.

ARTICLE 15

The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health.

ARTICLE 16

Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any

adverse distinction based on race, nationality, religious belief or political opinions, [*15] or any other distinction founded on similar criteria.

PART III

CAPTIVITY

SECTION I

BEGINNING OF CAPTIVITY

ARTICLE 17

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.

Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible the card shall measure 6.5 x 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken away from him.

No physical [*16] or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such prisoners shall be established by all possible means, subject to the provisions of the preceding paragraph.

The questioning of prisoners of war shall be carried out in a language which they understand.

ARTICLE 18

All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment.

At no time should prisoners of war be without identity documents. The Detaining Power shall supply such documents [*17] to prisoners of war who possess none.

Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.

Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given, legibly inscribed with the name, rank and unit of the person issuing the said

receipt. Sums in the currency of the Detaining Power, or which are changed into such currency at the prisoner's request, shall be placed to the credit of the prisoner's account as provided in Article 64.

The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security; when such articles are withdrawn, the procedure laid down for sums of money impounded shall apply.

Such objects, likewise sums taken away in any currency other than that of the Detaining Power and the conversion of which has not been asked for by the owners, shall be kept in the custody of the Detaining Power and shall be returned in their initial shape to prisoners of war at the end of their [*18] captivity.

ARTICLE 19

Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.

Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone.

Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.

ARTICLE 20

The evacuation of prisoners of war shall always be effected humanely and in conditions similar to those for the forces of the Detaining Power in their changes of station.

The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during evacuation, and shall establish as soon as possible a list of the prisoners of war who are evacuated.

If prisoners of war must, during evacuation, pass through transit camps, their stay in such camps shall be as brief as possible.

SECTION II

INTERNMENT OF PRISONERS OF WAR

CHAPTER [*19] I

GENERAL OBSERVATIONS

ARTICLE 21

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend. Such measures shall be taken particularly in cases where this may contribute to the

improvement of their state of health. No prisoner of war shall be compelled to accept liberty on parole or promise.

Upon the outbreak of hostilities, each Party to the conflict shall notify the adverse Party of the laws and regulations allowing or forbidding its own nationals to accept liberty on parole or promise. Prisoners of war who are paroled or who have given their promise in conformity [*20] with the laws and regulations so notified, are bound on their personal honour scrupulously to fulfil, both towards the Power on which they depend and towards the Power which has captured them, the engagements of their paroles or promises. In such cases, the Power on which they depend is bound neither to require nor to accept from them any service incompatible with the parole or promise given.

ARTICLE 22

Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.

Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate.

The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.

ARTICLE 23

No prisoner of war may at any time be [*21] sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population. With the exception of those engaged in the protection of their quarters against the aforesaid hazards, they may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favour of the population shall also apply to them.

Detaining Powers shall give the Powers concerned, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner of war camps.

Whenever military considerations permit, prisoner of war camps shall be indicated in the day-time by the letters PW or PG, placed so as to be clearly visible from the air. The Powers concerned may, however, agree upon any other system of marking. Only prisoner of war camps shall be marked as such.

ARTICLE 24

Transit or screening camps of a permanent kind shall be fitted out under conditions similar to those described [*22] in the present Section, and the prisoners therein shall have the same treatment as in other camps.

CHAPTER II

QUARTERS, FOOD AND CLOTHING OF PRISONERS OF WAR

ARTICLE 25

Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.

The foregoing provisions shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space and the general installations, bedding and blankets.

The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated and lighted, in particular between dusk and lights out. All precautions must be taken against the danger of fire.

In any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them.

ARTICLE 26

The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of [*23] weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners.

The Detaining Power shall supply prisoners of war who work with such additional rations as are necessary for the labour on which they are employed.

Sufficient drinking water shall be supplied to prisoners of war. The use of tobacco shall be permitted.

Prisoners of war shall, as far as possible, be associated with the preparation of their meals; they may be employed for that purpose in the kitchens. Furthermore, they shall be given the means of preparing, themselves, the additional food in their possession.

Adequate premises shall be provided for messing.

Collective disciplinary measures affecting food are prohibited.

ARTICLE 27

Clothing, underwear and footwear shall be supplied to prisoners of war in sufficient quantities by the Detaining Power, which shall make allowance for the climate of the region where the prisoners are detained. Uniforms of enemy armed forces captured by the Detaining Power should, if suitable for the climate, be made available to clothe prisoners of war.

The regular replacement and repair of the above articles shall be assured by the Detaining [*24] Power. In addition, prisoners of war who work shall receive appropriate clothing, wherever the nature of the work demands.

ARTICLE 28

Canteens shall be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use. The tariff shall never be in excess of local market prices.

The profits made by camp canteens shall be used for the benefit of the prisoners; a special fund shall be created for this purpose. The prisoners' representative shall have the right to collaborate in the management of the canteen and of this fund.

When a camp is closed down, the credit balance of the special fund shall be handed to an international welfare organization, to be employed for the benefit

of prisoners of war of the same nationality as those who have contributed to the fund. In case of a general repatriation, such profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.

CHAPTER III

HYGIENE AND MEDICAL ATTENTION

ARTICLE 29

The Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics.

Prisoners [*25] of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them.

Also, apart from the baths and showers with which the camps shall be furnished, prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.

ARTICLE 30

Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease.

Prisoners of war suffering from serious disease, or whose condition necessitates special treatment, a surgical operation or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given, even if their repatriation is contemplated in the near future. Special facilities shall be afforded for the care to be given to the disabled, in particular to the [*26] blind, and for their rehabilitation, pending repatriation.

Prisoners of war shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality.

Prisoners of war may not be prevented from presenting themselves to the medical authorities for examination. The detaining authorities shall, upon request, issue to every prisoner who has undergone treatment, an official certificate indicating the nature of his illness or injury, and the duration and kind of treatment received. A duplicate of this certificate shall be forwarded to the Central Prisoners of War Agency.

The costs of treatment, including those of any apparatus necessary for the maintenance of prisoners of war in good health, particularly dentures and other artificial appliances, and spectacles, shall be borne by the Detaining Power.

ARTICLE 31

Medical inspections of prisoners of war shall be held at least once a month. They shall include the checking and the recording of the weight of each prisoner of war. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of prisoners and to detect contagious diseases, especially [*27] tuberculosis, malaria and venereal disease. For this purpose the most efficient methods available shall be employed, e.g. periodic mass miniature radiography for the early detection of tuberculosis.

ARTICLE 31

Prisoners of war who, though not attached to the medical service of their armed forces, are physicians, surgeons, dentists, nurses or medical orderlies may be required by the Detaining Power to exercise their medical functions in the interests of prisoners of war dependent on the same Power. In that case they shall continue to be prisoners of war, but shall receive the same treatment as corresponding medical personnel retained by the Detaining Power. They shall be exempted from any other work under Article 49.

CHAPTER IV

MEDICAL PERSONNEL AND CHAPLAINS RETAINED TO ASSIST PRISONERS OF WAR

ARTICLE 33

Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention, and shall also be granted all facilities necessary to provide for the medical care of, and religious ministration [*28] to prisoners of war.

They shall continue to exercise their medical and spiritual functions for the benefit of prisoners of war, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the Detaining Power and under the control of its competent services, in accordance with their professional etiquette. They shall also benefit by the following facilities in the exercise of their medical or spiritual functions:

(a) They shall be authorized to visit periodically prisoners of war situated in working detachments or in hospitals outside the camp. For this purpose, the Detaining Power shall place at their disposal the necessary means of transport.

(b) The senior medical officer in each camp shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel. For this purpose, Parties to the conflict shall agree at the outbreak of hostilities on the subject of the corresponding ranks of the medical personnel, including that of societies mentioned in Article 26 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in [*29] Armed Forces in the Field of August 12, 1949. This senior medical officer, as well as chaplains, shall have the right to deal with the competent authorities of the camp on all questions relating to their duties. Such authorities shall afford them all necessary facilities for correspondence relating to these questions.

(c) Although they shall be subject to the internal discipline of the camp in which they are retained, such personnel may not be compelled to carry out any work other than that concerned with their medical or religious duties.

During hostilities, the Parties to the conflict shall agree concerning the possible relief of retained personnel and shall settle the procedure to be followed.

None of the preceding provisions shall relieve the Detaining Power of its obligations with regard to prisoners of war from the medical or spiritual point of view.

CHAPTER V

RELIGIOUS, INTELLECTUAL AND PHYSICAL ACTIVITIES

ARTICLE 34

Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities.

Adequate premises [*30] shall be provided where religious services may be held.

ARTICLE 35

Chaplains who fall into the hands of the enemy Power and who remain or are retained with a view to assisting prisoners of war, shall be allowed to minister to them and to exercise freely their ministry amongst prisoners of war of the same religion, in accordance with their religious conscience. They shall be allocated among the various camps and labour detachments containing prisoners of war belonging to the same forces, speaking the same language or practising the same religion. They shall enjoy the necessary facilities, including the means of transport provided for in Article 33, for visiting the prisoners of war outside their camp. They shall be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Letters and cards which they may send for this purpose shall be in addition to the quota provided for in Article 71.

ARTICLE 36

Prisoners of war who are ministers of religion, without having officiated as chaplains to their own forces, shall be at liberty, whatever their denomination, [*31] to minister freely to the members of their community. For this purpose, they shall receive the same treatment as the chaplains retained by the Detaining Power. They shall not be obliged to do any other work.

ARTICLE 37

When prisoners of war have not the assistance of a retained chaplain or of a prisoner of war minister of their faith, a minister belonging to the prisoners' or a similar denomination, or in his absence a qualified layman, if such a course is feasible from a confessional point of view, shall be appointed, at the request of the prisoners concerned, to fill this office. This appointment, subject to the approval of the Detaining Power, shall take place with the agreement of the community of prisoners concerned and, wherever necessary, with the approval of the local religious authorities of the same faith. The person thus appointed shall comply with all regulations established by the Detaining Power in the interests of discipline and military security.

ARTICLE 38

While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall [*32] take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment.

Prisoners shall have opportunities for taking physical exercise, including sports and games, and for being out of doors. Sufficient open spaces shall be provided for this purpose in all camps.

CHAPTER VI

DISCIPLINE

ARTICLE 39

Every prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power. Such officer shall have in his possession a copy of the present Convention; he shall ensure that its provisions are known to the camp staff and the guard and shall be responsible, under the direction of his government, for its application.

Prisoners of war, with the exception of officers, must salute and show to all officers of the Detaining Power the external marks of respect provided for by the regulations applying in their own forces.

Officer prisoners of war are bound to salute only officers of a higher rank of the Detaining Power; they must, however, salute the camp commander regardless of his rank.

ARTICLE 40

The wearing of badges of rank and nationality, as well [*33] as of decorations, shall be permitted.

ARTICLE 41

In every camp the text of the present Convention and its Annexes and the contents of any special agreement provided for in Article 6, shall be posted, in the prisoners' own language, in places where all may read them. Copies shall be supplied, on request, to the prisoners who cannot have access to the copy which has been posted.

Regulations, orders, notices and publications of every kind relating to the conduct of prisoners of war shall be issued to them in a language which they understand. Such regulations, orders and publications shall be posted in the manner described above and copies shall be handed to the prisoners' representative. Every order and command addressed to prisoners of war individually must likewise be given in a language which they understand.

ARTICLE 42

The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.

CHAPTER VII

RANK OF PRISONERS OF WAR

ARTICLE 43

Upon the outbreak of hostilities, the Parties to the conflict shall communicate to one another [*34] the titles and ranks of all the persons mentioned in Article 4 of the present Convention, in order to ensure equality of treatment between prisoners of equivalent rank. Titles and ranks which are subsequently created shall form the subject of similar communications.

The Detaining Power shall recognize promotions in rank which have been accorded to prisoners of war and which have been duly notified by the Power on which these prisoners depend.

ARTICLE 44

Officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

In order to ensure service in officers' camps, other ranks of the same armed forces who, as far as possible, speak the same language, shall be assigned in sufficient numbers, account being taken of the rank of officers and prisoners of equivalent status. Such orderlies shall not be required to perform any other work.

Supervision of the mess by the officers themselves shall be facilitated in every way.

ARTICLE 45

Prisoners of war other than officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

Supervision of the mess by the prisoners themselves shall be facilitated in every way.

CHAPTER [*35] VIII

TRANSFER OF PRISONERS OF WAR AFTER THEIR ARRIVAL IN CAMP

ARTICLE 46

The Detaining Power, when deciding upon the transfer of prisoners of war, shall take into account the interests of the prisoners themselves, more especially so as not to increase the difficulty of their repatriation.

The transfer of prisoners of war shall always be effected humanely and in conditions not less favourable than those under which the forces of the Detaining Power are transferred. Account shall always be taken of the climatic conditions to which the prisoners of war are accustomed and the conditions of transfer shall in no case be prejudicial to their health.

The Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health, likewise with the necessary clothing, shelter and medical attention. The Detaining Power shall take adequate precautions especially in case of transport by sea or by air, to ensure their safety during transfer, and shall draw up a complete list of all transferred prisoners before their departure.

ARTICLE 47

Sick or wounded prisoners of war shall not be transferred as long as their recovery may be endangered by [*36] the journey, unless their safety imperatively demands it.

If the combat zone draws closer to a camp, the prisoners of war in the said camp shall not be transferred unless their transfer can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred.

ARTICLE 48

In the event of transfer, prisoners of war shall be officially advised of their departure and of their new postal address. Such notifications shall be given in time for them to pack their luggage and inform their next of kin.

They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of transfer so require, to what each prisoner can reasonably carry, which shall in no case be more than twenty-five kilograms per head.

Mail and parcels addressed to their former camp shall be forwarded to them without delay. The camp commander shall take, in agreement with the prisoners' representative, any measures needed to ensure the transport of the prisoners'

community property and of the luggage they are unable to take with them [*37] in consequence of restrictions imposed by virtue of the second paragraph of this Article.

The costs of transfers shall be borne by the Detaining Power.

SECTION III

LABOUR OF PRISONERS OF WAR

ARTICLE 49

The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude and with a view particularly to maintaining them in a good state of physical and mental health.

Non-commissioned officers who are prisoners of war shall only be required to do supervisory work. Those not so required may ask for other suitable work which shall, so far as possible, be found for them.

If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may in no circumstances be compelled to work.

ARTICLE 50

Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes:

(a) agriculture;
(b) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and [*38] chemical industries; public works and building operations which have no military character or purpose;
(c) transport and handling of stores which are not military in character or purpose;
(d) commercial business, and arts and crafts;
(e) domestic service;
(f) public utility services having no military character or purpose.

Should the above provisions be infringed, prisoners of war shall be allowed to exercise their right of complaint, in conformity with Article 78.

ARTICLE 51

Prisoners of war must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; such conditions shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work, account shall also be taken of climatic conditions.

The Detaining Power, in utilizing the labour of prisoners of war, shall ensure that in areas in which such prisoners are employed, the national legislation concerning the protection of labour, and, more particularly, the regulations for the safety of workers, are duly applied.

Prisoners of war shall receive training and be provided with the means of protection suitable to the work they will have to do [*39] and similar to those accorded to the nationals of the Detaining Power. Subject to the provisions of Article 52, prisoners may be submitted to the normal risks run by these civilian workers.

Conditions of labour shall in no case be rendered more arduous by disciplinary measures.

ARTICLE 52

Unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature.

No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces.

The removal of mines or similar devices shall be considered as dangerous labour.

ARTICLE 53

The duration of the daily labour of prisoners of war, including the time of the journey to and fro, shall not be excessive, and must in no case exceed that permitted for civilian workers in the district, who are nationals of the Detaining Power and employed on the same work.

Prisoners of war must be allowed, in the middle of the day's work, a rest of not less than one hour. This rest will be the same as that to which workers of the Detaining Power are entitled, if the latter is of longer duration. They shall be allowed in addition a rest of twenty-four consecutive [*40] hours every week, preferably on Sunday or the day of rest in their country of origin. Furthermore, every prisoner who has worked for one year shall be granted a rest of eight consecutive days, during which his working pay shall be paid him.

If methods of labour such as piece work are employed, the length of the working period shall not be rendered excessive thereby.

ARTICLE 54

The working pay due to prisoners of war shall be fixed in accordance with the provisions of Article 62 of the present Convention.

Prisoners of war who sustain accidents in connection with work, or who contract a disease in the course, or in consequence of their work, shall receive all the care their condition may require. The Detaining Power shall furthermore deliver to such prisoners of war a medical certificate enabling them to submit their claims to the Power on which they depend, and shall send a duplicate to the Central Prisoners of War Agency provided for in Article 123.

ARTICLE 55

The fitness of prisoners of war for work shall be periodically verified by medical examinations at least once a month. The examinations shall have particular regard to the nature of the work which prisoners of war are required [*41] to do.

If any prisoner of war considers himself incapable of working, he shall be permitted to appear before the medical authorities of his camp. Physicians or surgeons may recommend that the prisoners who are, in their opinion, unfit for work, be exempted therefrom.

ARTICLE 56

The organization and administration of labour detachments shall be similar to those of prisoner of war camps.

Every labour detachment shall remain under the control of and administratively part of a prisoner of war camp. The military authorities and the commander of the said camp shall be responsible, under the direction of

their government, for the observance of the provisions of the present Convention in labour detachments.

The camp commander shall keep an up-to-date record of the labour detachments dependent on his camp, and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross, or of other agencies giving relief to prisoners of war, who may visit the camp.

ARTICLE 57

The treatment of prisoners of war who work for private persons, even if the latter are responsible for guarding and protecting them, shall not be inferior to that which is provided for [*42] by the present Convention. The Detaining Power, the military authorities and the commander of the camp to which such prisoners belong shall be entirely responsible for the maintenance, care, treatment, and payment of the working pay of such prisoners of war.

Such prisoners of war shall have the right to remain in communication with the prisoners' representatives in the camps on which they depend.

SECTION IV

FINANCIAL RESOURCES OF PRISONERS OF WAR

ARTICLE 58

Upon the outbreak of hostilities, and pending an arrangement on this matter with the Protecting Power, the Detaining Power may determine the maximum amount of money in cash or in any similar form, that prisoners may have in their possession. Any amount in excess, which was properly in their possession and which has been taken or withheld from them, shall be placed to their account, together with any monies deposited by them, and shall not be converted into any other currency without their consent.

If prisoners of war are permitted to purchase services or commodities outside the camp against payment in cash, such payments shall be made by the prisoner himself or by the camp administration who will charge them to the accounts of [*43] the prisoners concerned. The Detaining Power will establish the necessary rules in this respect.

ARTICLE 59

Cash which was taken from prisoners of war, in accordance with Article 18, at the time of their capture, and which is in the currency of the Detaining Power, shall be placed to their separate accounts, in accordance with the provisions of Article 64 of the present Section.

The amounts, in the currency of the Detaining Power, due to the conversion of sums in other currencies that are taken from the prisoners of war at the same time, shall also be credited to their separate accounts.

ARTICLE 60

The Detaining Power shall grant all prisoners of war a monthly advance of pay, the amount of which shall be fixed by conversion, into the currency of the said Power, of the following amounts:

Category I: Prisoners ranking below sergeants: eight Swiss francs.
Category II: Sergeants and other non-commissioned officers, or prisoners of equivalent rank: twelve Swiss francs.
Category III: Warrant officers and commissioned officers below the rank of major or prisoners of equivalent rank: fifty Swiss francs.

Category IV: Majors, lieutenant-colonels, colonels or prisoners of equivalent rank: [*44] sixty Swiss francs.
Category V: General officers or prisoners of war of equivalent rank: seventy-five Swiss francs.

However, the Parties to the conflict concerned may by special agreement modify the amount of advances of pay due to prisoners of the preceding categories.

Furthermore, if the amounts indicated in the first paragraph above would be unduly high compared with the pay of the Detaining Power's armed forces or would, for any reason, seriously embarrass the Detaining Power, then, pending the conclusion of a special agreement with the Power on which the prisoners depend to vary the amounts indicated above, the Detaining Power:

(a) shall continue to credit the accounts of the prisoners with the amounts indicated in the first paragraph above;

(b) may temporarily limit the amount made available from these advances of pay to prisoners of war for their own use, to sums which are reasonable, but which, for Category I, shall never be inferior to the amount that the Detaining Power gives to the members of its own armed forces.

The reasons for any limitations will be given without delay to the Protecting Power.

ARTICLE 61

The Detaining Power shall accept for distribution [*45] as supplementary pay to prisoners of war sums which the Power on which the prisoners depend may forward to them, on condition that the sums to be paid shall be the same for each prisoner of the same category, shall be payable to all prisoners of that category depending on that Power, and shall be placed in their separate accounts, at the earliest opportunity, in accordance with the provisions of Article 64. Such supplementary pay shall not relieve the Detaining Power of any obligation under this Convention.

ARTICLE 62

Prisoners of war shall be paid a fair working rate of pay by the detaining authorities direct. The rate shall be fixed by the said authorities, but shall at no time be less than one-fourth of one Swiss franc for a full working day. The Detaining Power shall inform prisoners of war, as well as the Power on which they depend, through the intermediary of the Protecting Power, of the rate of daily working pay that it has fixed.

Working pay shall likewise be paid by the detaining authorities to prisoners of war permanently detailed to duties or to a skilled or semi-skilled occupation in connection with the administration, installation or maintenance of camps, and to the prisoners [*46] who are required to carry out spiritual or medical duties on behalf of their comrades.

The working pay of the prisoners' representative, of his advisers, if any, and of his assistants, shall be paid out of the fund maintained by canteen profits. The scale of this working pay shall be fixed by the prisoners' representative and approved by the camp commander. If there is no such fund, the detaining authorities shall pay these prisoners a fair working rate of pay.

ARTICLE 63

Prisoners of war shall be permitted to receive remittances of money addressed to them individually or collectively.

Every prisoner of war shall have at his disposal the credit balance of his account as provided for in the following Article, within the limits fixed by the Detaining Power, which shall make such payments as are requested. Subject to financial or monetary restrictions which the Detaining Power regards as essential, prisoners of war may also have payments made abroad. In this case payments addressed by prisoners of war to dependents shall be given priority.

In any event, and subject to the consent of the Power on which they depend, prisoners may have payments made in their own country, as follows: the [*47] Detaining Power shall send to the aforesaid Power through the Protecting Power, a notification giving all the necessary particulars concerning the prisoners of war, the beneficiaries of the payments, and the amount of the sums to be paid, expressed in the Detaining Power's currency. The said notification shall be signed by the prisoners and countersigned by the camp commander. The Detaining Power shall debit the prisoners' account by a corresponding amount; the sums thus debited shall be placed by it to the credit of the Power on which the prisoners depend.

To apply the foregoing provisions, the Detaining Power may usefully consult the Model Regulations in Annex V of the present Convention.

ARTICLE 64

The Detaining Power shall hold an account for each prisoner of war, showing at least the following:

(1) The amounts due to the prisoner or received by him as advances of pay, as working pay or derived from any other source; the sums in the currency of the Detaining Power which were taken from him; the sums taken from him and converted at his request into the currency of the said Power.

(2) The payments made to the prisoner in cash, or in any other similar form; the payments made [*48] on his behalf and at his request; the sums transferred under Article 63, third paragraph.

ARTICLE 65

Every item entered in the account of a prisoner of war shall be countersigned or initialled by him, or by the prisoners' representative acting on his behalf.

Prisoners of war shall at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts, which may likewise be inspected by the representatives of the Protecting Powers at the time of visits to the camp.

When prisoners of war are transferred from one camp to another, their personal accounts will follow them. In case of transfer from one Detaining Power to another, the monies which are their property and are not in the currency of the Detaining Power will follow them. They shall be given certificates for any other monies standing to the credit of their accounts.

The Parties to the conflict concerned may agree to notify to each other at specific intervals through the Protecting Power, the amount of the accounts of the prisoners of war.

ARTICLE 66

On the termination of captivity, through the release of a prisoner of war or his repatriation, the Detaining Power shall give him a statement, signed [*49] by an authorized officer of that Power, showing the credit balance then due to him. The Detaining Power shall also send through the Protecting Power to the government upon which the prisoner of war depends, lists giving all appropriate particulars of all prisoners of war whose captivity has been terminated by repatriation, release, escape, death or any other means, and showing the amount of their credit balances. Such lists shall be certified on each sheet by an authorized representative of the Detaining Power.

Any of the above provisions of this Article may be varied by mutual agreement between any two Parties to the conflict.

The Power on which the prisoner of war depends shall be responsible for settling with him any credit balance due to him from the Detaining Power on the termination of his captivity.

ARTICLE 67

Advances of pay, issued to prisoners of war in conformity with Article 60, shall be considered as made on behalf of the Power on which they depend. Such advances of pay, as well as all payments made by the said Power under Article 63, third paragraph, and Article 68, shall form the subject of arrangements between the Powers concerned, at the close of hostilities.

ARTICLE [*50] 68

Any claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends, through the Protecting Power. In accordance with Article 54, the Detaining Power will, in all cases, provide the prisoner of war concerned with a statement showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or hospital treatment given for it. This statement will be signed by a responsible officer of the Detaining Power and the medical particulars certified by a medical officer.

Any claim by a prisoner of war for compensation in respect of personal effects monies or valuables impounded by the Detaining Power under Article 18 and not forthcoming on his repatriation, or in respect of loss alleged to be due to the fault of the Detaining Power or any of its servants, shall likewise be referred to the Power on which he depends. Nevertheless, any such personal effects required for use by the prisoners of war whilst in captivity shall be replaced at the expense of the Detaining Power. The Detaining Power will, in all cases, provide the prisoner of war with a statement, [*51] signed by a responsible officer, showing all available information regarding the reasons why such effects, monies or valuables have not been restored to him. A copy of this statement will be forwarded to the Power on which he depends through the Central Prisoners of War Agency provided for in Article 123.

SECTION V

RELATIONS OF PRISONERS OF WAR WITH THE EXTERIOR

ARTICLE 69

Immediately upon prisoners of war falling into its power, the Detaining Power shall inform them and the Powers on which they depend, through the Protecting Power, of the measures taken to carry out the provisions of the present Section. They shall likewise inform the parties concerned of any subsequent modifications of such measures.

ARTICLE 70

Immediately upon capture, or not more than one week after arrival at a camp even if it is a transit camp, likewise in case of sickness or transfer to hospital or to another camp, every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card similar, if possible, to the model annexed to the present Convention, informing his relatives of his capture, address [*52] and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner

ARTICLE 71

Prisoners of war shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each prisoner of war, the said number shall not be less than two letters and four cards monthly, exclusive of the capture cards provided for in Article 70, and conforming as closely as possible to the models annexed to the present Convention. Further limitations may be imposed only if the Protecting Power is satisfied that it would be in the interests of the prisoners of war concerned to do so owing to difficulties of translation caused by the Detaining Power's inability to find sufficient qualified linguists to carry out the necessary censorship. If limitations must be placed on the correspondence addressed to prisoners of war, they may be ordered only by the Power on which the prisoners depend, possibly at the request of the Detaining Power. Such letters and cards must be conveyed by the most rapid method at the disposal of the Detaining Power; they may not be delayed or retained for disciplinary [*53] reasons.

Prisoners of war who have been without news for a long period, or who are unable to receive news from their next of kin or to give them news by the ordinary postal route, as well as those who are at a great distance from their homes, shall be permitted to send telegrams, the fees being charged against the prisoners of war's accounts with the Detaining Power or paid in the currency at their disposal. They shall likewise benefit by this measure in cases of urgency.

As a general rule, the correspondence of prisoners of war shall be written in their native language. The Parties to the conflict may allow correspondence in other languages.

Sacks containing prisoner of war mail must be securely sealed and labelled so as clearly to indicate their contents, and must be addressed to offices of destination.

ARTICLE 72

Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments [*54] sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.

Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

The only limits which may be placed on these shipments shall be those proposed by the Protecting Power in the interest of the prisoners themselves, or by the International Committee of the Red Cross or any other organization giving

assistance to the prisoners, in respect of their own shipments only, on account of exceptional strain on transport or communications.

The conditions for the sending of individual parcels and collective relief shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the prisoners of relief supplies. Books may not be included in parcels of clothing and foodstuffs. Medical supplies shall, as a rule, be sent in collective parcels.

ARTICLE 73

In the absence of special agreements between the Powers concerned on the conditions for the receipt and distribution of collective relief shipments, the rules and regulations concerning collective shipments, which [*55] are annexed to the present Convention, shall be applied.

The special agreements referred to above shall in no case restrict the right of prisoners' representatives to take possession of collective relief shipments intended for prisoners of war, to proceed to their distribution or to dispose of them in the interest of the prisoners.

Nor shall such agreements restrict the right of representatives of the Protecting Power, the International Committee of the Red Cross or any other organization giving assistance to prisoners of war and responsible for the forwarding of collective shipments, to supervise their distribution to the recipients.

ARTICLE 74

All relief shipments for prisoners of war shall be exempt from import, customs and other dues.

Correspondence, relief shipments and authorized remittances of money addressed to prisoners of war or despatched by them through the post office, either direct or through the Information Bureaux provided for in Article 122 and the Central Prisoners of War Agency provided for in Article 123, shall be exempt from any postal dues, both in the countries of origin and destination, and in intermediate countries.

If relief shipments intended for prisoners [*56] of war cannot be sent through the post office by reason of weight or for any other cause, the cost of transportation shall be borne by the Detaining Power in all the territories under its control. The other Powers party to the Convention shall bear the cost of transport in their respective territories.

In the absence of special agreements between the Parties concerned, the costs connected with transport of such shipments, other than costs covered by the above exemption, shall be charged to the senders.

The High Contracting Parties shall endeavour to reduce, so far as possible, the rates charged for telegrams sent by prisoners of war, or addressed to them.

ARTICLE 75

Should military operations prevent the Powers concerned from fulfilling their obligation to assure the transport of the shipments referred to in Articles 70, 71, 72 and 77, the Protecting Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means (railway wagons, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to [*57] supply them

with such transport and to allow its circulation, especially by granting the necessary safe-conducts.

Such transport may also be used to convey:

(a) correspondence, lists and reports exchanged between the Central Information Agency referred to in Article 123 and the National Bureaux referred to in Article 122;

(b) correspondence and reports relating to prisoners of war which the Protecting Powers, the International Committee of the Red Cross or any other body assisting the prisoners, exchange either with their own delegates or with the Parties to the conflict.

These provisions in no way detract from the right of any Party to the conflict to arrange other means of transport, if it should so prefer, nor preclude the granting of safe-conducts, under mutually agreed conditions, to such means of transport.

In the absence of special agreements, the costs occasioned by the use of such means of transport shall be borne proportionally by the Parties to the conflict whose nationals are benefited thereby.

ARTICLE 76

The censoring of correspondence addressed to prisoners of war or despatched by them shall be done as quickly as possible. Mail shall be censored only by [*58] the despatching State and the receiving State, and once only by each.

The examination of consignments intended for prisoners of war shall not be carried out under conditions that will expose the goods contained in them to deterioration; except in the case of written or printed matter, it shall be done in the presence of the addressee, or of a fellow-prisoner duly delegated by him. The delivery to prisoners of individual or collective consignments shall not be delayed under the pretext of difficulties of censorship.

Any prohibition of correspondence ordered by Parties to the conflict, either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

ARTICLE 77

The Detaining Powers shall provide all facilities for the transmission, through the Protecting Power or the Central Prisoners of War Agency provided for in Article 123, of instruments, papers or documents intended for prisoners of war or despatched by them, especially powers of attorney and wills.

In all cases they shall facilitate the preparation and execution of such documents on behalf of prisoners of war; in particular, they shall allow them to consult a lawyer and shall take [*59] what measures are necessary for the authentication of their signatures.

SECTION VI

RELATIONS BETWEEN PRISONERS OF WAR AND THE AUTHORITIES

CHAPTER I

COMPLAINTS OF PRISONERS OF WAR RESPECTING THE CONDITIONS OF CAPTIVITY

ARTICLE 78

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Prisoners of war shall have the right to make known to the military authorities in whose power they are, their requests regarding the conditions of captivity to which they are subjected.

They shall also have the unrestricted right to apply to the representatives of the Protecting Powers either through their prisoners' representative or, if they consider it necessary, direct, in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity.

These requests and complaints shall not be limited nor considered to be a part of the correspondence quota referred to in Article 71. They must be transmitted immediately. Even if they are recognized to be unfounded, they may not give rise to any punishment.

Prisoners' representatives may send periodic reports on the situation in the camps and the needs of the prisoners of war to the representatives of the Protecting Powers.

CHAPTER II

PRISONER OF WAR REPRESENTATIVES [*60]

ARTICLE 79

In all places where there are prisoners of war, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners' representatives entrusted with representing them before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. These prisoners' representatives shall be eligible for re-election.

In camps for officers and persons of equivalent status or in mixed camps, the senior officer among the prisoners of war shall be recognized as the camp prisoners' representative. In camps for officers, he shall be assisted by one or more advisers chosen by the officers; in mixed camps, his assistants shall be chosen from among the prisoners of war who are not officers and shall be elected by them.

Officer prisoners of war of the same nationality shall be stationed in labour camps for prisoners of war, for the purpose of carrying out the camp administration duties for which the prisoners of war are responsible. These officers may be elected as prisoners' representatives under the first paragraph of this Article. [*61] In such a case the assistants to the prisoners' representatives shall be chosen from among those prisoners of war who are not officers.

Every representative elected must be approved by the Detaining Power before he has the right to commence his duties. Where the Detaining Power refuses to approve a prisoner of war elected by his fellow prisoners of war, it must inform the Protecting Power of the reason for such refusal.

In all cases the prisoners' representative must have the same nationality, language and customs as the prisoners of war whom he represents. Thus, prisoners of war distributed in different sections of a camp, according to their nationality, language or customs, shall have for each section their own prisoners' representative, in accordance with the foregoing paragraphs.

ARTICLE 80

Prisoners' representatives shall further the physical, spiritual and intellectual well-being of prisoners of war.

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In particular, where the prisoners decide to organize amongst themselves a system of mutual assistance, this organization will be within the province of the prisoners' representative, in addition to the special duties entrusted to him by other provisions of the present Convention. [*62]

Prisoners' representatives shall not be held responsible, simply by reason of their duties, for any offences committed by prisoners of war.

ARTICLE 81

Prisoners' representatives shall not be required to perform any other work if the accomplishment of their duties is thereby made more difficult.

Prisoners' representatives may appoint from amongst the prisoners such assistants as they may require. All material facilities shall be granted them, particularly a certain freedom of movement necessary for the accomplishment of their duties (inspection of labour detachments, receipt of supplies, etc.).

Prisoners' representatives shall be permitted to visit premises where prisoners of war are detained, and every prisoner of war shall have the right to consult freely his prisoners' representative.

All facilities shall likewise be accorded to the prisoners' representatives for communication by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, the Mixed Medical Commissions and the bodies which give assistance to prisoners of war. Prisoners' representatives of labour detachments shall enjoy the same facilities [*63] for communication with the prisoners' representatives of the principal camp. Such communications shall not be restricted, nor considered as forming a part of the quota mentioned in Article 71.

Prisoners' representatives who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs.

In case of dismissal, the reasons therefor shall be communicated to the Protecting Power.

CHAPTER III

PENAL AND DISCIPLINARY SANCTIONS

I. General Provisions

ARTICLE 82

A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.

If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only.

ARTICLE 83 [*64]

In deciding whether proceedings in respect of an offence alleged to have been committed by a prisoner of war shall be judicial or disciplinary, the Detaining Power shall ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures.

ARTICLE 84

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.

ARTICLE 85

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

ARTICLE 86

No prisoner of war may be punished more than once for the same act [*65] or on the same charge.

ARTICLE 87

Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.

When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.

Collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.

No prisoner of war may be deprived of his rank by the Detaining Power, or prevented from wearing his badges.

ARTICLE 88

Officers, non-commissioned officers and men who are prisoners of war undergoing a [*66] disciplinary or judicial punishment, shall not be subjected to more severe treatment than that applied in respect of the same punishment to members of the armed forces of the Detaining Power of equivalent rank.

A woman prisoner of war shall not be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a woman member of the armed forces of the Detaining Power dealt with for a similar offence.

In no case may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence.

Prisoners of war who have served disciplinary or judicial sentences may not be treated differently from other prisoners of war.

II. Disciplinary Sanctions

ARTICLE 89

The disciplinary punishments applicable to prisoners of war are the following:

(1) A fine which shall not exceed 50 per cent of the advances of pay and working pay which the prisoner of war would otherwise receive under the provisions of Articles 60 and 62 during a period of not more than thirty days.

(2) Discontinuance of privileges [*67] granted over and above the treatment provided for by the present Convention.

(3) Fatigue duties not exceeding two hours daily.

(4) Confinement.

The punishment referred to under (3) shall not be applied to officers.

In no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of prisoners of war.

ARTICLE 90

The duration of any single punishment shall in no case exceed thirty days. Any period of confinement awaiting the hearing of a disciplinary offence or the award of disciplinary punishment shall be deducted from an award pronounced against a prisoner of war.

The maximum of thirty days provided above may not be exceeded, even if the prisoner of war is answerable for several acts at the same time when he is awarded punishment, whether such acts are related or not.

The period between the pronouncing of an award of disciplinary punishment and its execution shall not exceed one month.

When a prisoner of war is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments if the duration of one of these is ten days or more.

ARTICLE 91

The escape of a prisoner of war shall be [*68] deemed to have succeeded when:

(1) he has joined the armed forces of the Power on which he depends, or those of an allied Power;

(2) he has left the territory under the control of the Detaining Power, or of an ally of the said Power;

(3) he has joined a ship flying the flag of the Power on which he depends, or of an allied Power, in the territorial waters of the Detaining Power, the said ship not being under the control of the last named Power.

Prisoners of war who have made good their escape in the sense of this Article and who are recaptured, shall not be liable to any punishment in respect of their previous escape.

ARTICLE 92

A prisoner of war who attempts to escape and is recaptured before having made good his escape in the sense of Article 91 shall be liable only to a disciplinary punishment in respect of this act, even if it is a repeated offence.

A prisoner of war who is recaptured shall be handed over without delay to the competent military authority.

Article 88, fourth paragraph, notwithstanding, prisoners of war punished as a result of an unsuccessful escape may be subjected to special surveillance. Such surveillance must not affect the state of their health, must [*69] be undergone in a prisoner of war camp, and must not entail the suppression of any of the safeguards granted them by the present Convention.

ARTICLE 93

Escape or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance if the prisoner of war is subjected to trial by judicial proceedings in respect of an offence committed during his escape or attempt to escape.

In conformity with the principle stated in Article 83, offences committed by prisoners of war with the sole intention of facilitating their escape and which do not entail any violence against life or limb, such as offences against public property, theft without intention of self-enrichment, the drawing up or use of false papers, or the wearing of civilian clothing, shall occasion disciplinary punishment only.

Prisoners of war who aid or abet an escape or an attempt to escape shall be liable on this count to disciplinary punishment only.

ARTICLE 94

If an escaped prisoner of war is recaptured, the Power on which he depends shall be notified thereof in the manner defined in Article 122, provided notification of his escape has been made.

ARTICLE 95

A prisoner of war accused of an offence [*70] against discipline shall not be kept in confinement pending the hearing unless a member of the armed forces of the Detaining Power would be so kept if he were accused of a similar offence, or if it is essential in the interests of camp order and discipline.

Any period spent by a prisoner of war in confinement awaiting the disposal of an offence against discipline shall be reduced to an absolute minimum and shall not exceed fourteen days.

The provisions of Articles 97 and 98 of this Chapter shall apply to prisoners of war who are in confinement awaiting the disposal of offences against discipline.

ARTICLE 96

Acts which constitute offences against discipline shall be investigated immediately.

Without prejudice to the competence of courts and superior military authorities, disciplinary punishment may be ordered only by an officer having disciplinary powers in his capacity as camp commander, or by a responsible officer who replaces him or to whom he has delegated his disciplinary powers.

In no case may such powers be delegated to a prisoner of war or be exercised by a prisoner of war.

Before any disciplinary award is pronounced, the accused shall be given precise information regarding [*71] the offences of which he is accused and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced to the accused prisoner of war and to the prisoners' representative.

A record of disciplinary punishments shall be maintained by the camp commander and shall be open to inspection by representatives of the Protecting Power.

ARTICLE 97

Prisoners of war shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

All premises in which disciplinary punishments are undergone shall conform to the sanitary requirements set forth in Article 25. A prisoner of war undergoing punishment shall be enabled to keep himself in a state of cleanliness, in conformity with Article 29.

Officers and persons of equivalent status shall not be lodged in the same quarters as non-commissioned officers or men.

Women prisoners of war undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war [*72] and shall be under the immediate supervision of women.

ARTICLE 98

A prisoner of war undergoing confinement as a disciplinary punishment, shall continue to enjoy the benefits of the provisions of this Convention except in so far as these are necessarily rendered inapplicable by the mere fact that he is confined. In no case may he be deprived of the benefits of the provisions of Articles 78 and 126.

A prisoner of war awarded disciplinary punishment may not be deprived of the prerogatives attached to his rank.

Prisoners of war awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily.

They shall be allowed, on their request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the camp infirmary or to a hospital.

They shall have permission to read and write, likewise to send and receive letters. Parcels and remittances of money however, may be withheld from them until the completion of the punishment; they shall meanwhile be entrusted to the prisoners' representative, who will hand over to the infirmary the perishable goods contained [*73] in such parcels.

III. Judicial Proceedings

ARTICLE 99

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

ARTICLE 100

Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power.

Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power on which the prisoners of war depend.

The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in [*74] its power as the result of circumstances independent of his own will.

ARTICLE 101

If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107.

ARTICLE 102

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

ARTICLE 103

Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

Any period spent by a prisoner of war in confinement [*75] awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.

The provisions of Articles 97 and 98 of this Chapter shall apply to a prisoner of war whilst in confinement awaiting trial.

ARTICLE 104

In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial. This

period of three weeks shall run as from the day on which such notification reaches the Protecting Power at the address previously indicated by the latter to the Detaining Power.

The said notification shall contain the following information:

(1) Surname and first names of the prisoner of war, his rank, his army regimental, personal or serial number, his date of birth, and his profession or trade, if any;

(2) Place of internment or confinement;

(3) Specification of the charge or charges on which the prisoner of war is to be arraigned, giving the legal provisions applicable;

(4) Designation of the court which will try the case, likewise the date and place fixed for the opening of the [*76] trial.

The same communication shall be made by the Detaining Power to the prisoners' representative.

If no evidence is submitted, at the opening of a trial, that the notification referred to above was received by the Protecting Power, by the prisoner of war and by the prisoners' representative concerned, at least three weeks before the opening of the trial, then the latter cannot take place and must be adjourned.

ARTICLE 105

The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate [*77] or counsel to conduct the defence.

The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language which he understands, and in good time before the opening of the trial. The same communication in the same circumstances shall be made to the advocate or counsel conducting the defence on behalf of the prisoner of war.

The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held *in camera* [*78] in the

interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

ARTICLE 106

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

ARTICLE 107

Any judgment and sentence pronounced upon a prisoner of war shall be immediately reported to the Protecting Power in the form of a summary communication, which shall also indicate whether he has the right of appeal with a view to the quashing of the sentence or the reopening of the trial. This communication shall likewise be sent to the prisoners' representative concerned. It shall also be sent to the accused prisoner of war in a language he understands, if the sentence was not pronounced in his presence. The Detaining Power shall also immediately communicate to the Protecting Power the decision of the prisoner of war to use or to waive his right of appeal.

Furthermore, [*79] if a prisoner of war is finally convicted or if a sentence pronounced on a prisoner of war in the first instance is a death sentence, the Detaining Power shall as soon as possible address to the Protecting Power a detailed communication containing:

(1) the precise wording of the finding and sentence;

(2) a summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and the defence;

(3) notification, where applicable, of the establishment where the sentence will be served.

The communications provided for in the foregoing sub-paragraphs shall be sent to the Protecting Power at the address previously made known to the Detaining Power.

ARTICLE 108

Sentences pronounced on prisoners of war after a conviction has become duly enforceable shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

A woman prisoner of war on whom such a sentence has been pronounced shall be confined in separate quarters and shall be under the supervision of women. [*80]

In any case, prisoners of war sentenced to a penalty depriving them of their liberty shall retain the benefit of the provisions of Articles 78 and 126 of the present Convention. Furthermore, they shall be entitled to receive and despatch correspondence, to receive at least one relief parcel monthly, to take regular exercise in the open air, to have the medical care required by their state of health, and the spiritual assistance they may desire. Penalties to which they may be subjected shall be in accordance with the provisions of Article 87, third paragraph.

PART IV

TERMINATION OF CAPTIVITY

SECTION I

DIRECT REPATRIATION AND ACCOMMODATION IN NEUTRAL COUNTRIES

ARTICLE 109

Subject to the provisions of the third paragraph of this Article, Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel, in accordance with the first paragraph of the following Article.

Throughout the duration of hostilities, Parties to the conflict shall endeavour, with the cooperation of the neutral Powers concerned, to make arrangements for the accommodation [*81] in neutral countries of the sick and wounded prisoners of war referred to in the second paragraph of the following Article. They may, in addition, conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

No sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article, may be repatriated against his will during hostilities.

ARTICLE 110

The following shall be repatriated direct:

(1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.

(2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.

(3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.

The following may be accommodated in a neutral country:

(1) Wounded and sick whose recovery may be expected within one year of the date of the wound or the beginning of the illness, if treatment in [*82] a neutral country might increase the prospects of a more certain and speedy recovery.

(2) Prisoners of war whose mental or physical health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat.

The conditions which prisoners of war accommodated in a neutral country must fulfil in order to permit their repatriation shall be fixed, as shall likewise their status, by agreement between the Powers concerned. In general, prisoners of war who have been accommodated in a neutral country, and who belong to the following categories, should be repatriated:

(1) Those whose state of health has deteriorated so as to fulfil the conditions laid down for direct repatriation.

(2) Those whose mental or physical powers remain, even after treatment, considerably impaired.

If no special agreements are concluded between the Parties to the conflict concerned, to determine the cases of disablement or sickness entailing direct repatriation or accommodation in a neutral country, such cases shall be settled in accordance with the principles laid down in the Model Agreement concerning direct repatriation [*83] and accommodation in neutral countries of wounded and sick prisoners of war and in the Regulations concerning Mixed Medical Commissions annexed to the present Convention.

ARTICLE 111

The Detaining Power, the Power on which the prisoners of war depend, and a neutral Power agreed upon by these two Powers, shall endeavour to conclude agreements which will enable prisoners of war to be interned in the territory of the said neutral Power until the close of hostilities.

ARTICLE 112

Upon the outbreak of hostilities, Mixed Medical Commissions shall be appointed to examine sick and wounded prisoners of war, and to make all appropriate decisions regarding them. The appointment, duties and functioning of these Commissions shall be in conformity with the provisions of the Regulations annexed to the present Convention.

However, prisoners of war who, in the opinion of the medical authorities of the Detaining Power, are manifestly seriously injured or seriously sick, may be repatriated without having to be examined by a Mixed Medical Commission.

ARTICLE 113

Besides those who are designated by the medical authorities of the Detaining Power, wounded or sick prisoners of war belonging to the categories [*84] listed below shall be entitled to present themselves for examination by the Mixed Medical Commissions provided for in the foregoing Article:

(1) Wounded and sick proposed by a physician or surgeon who is of the same nationality, or a national of a Party to the conflict allied with the Power on which the said prisoners depend, and who exercises his functions in the camp.

(2) Wounded and sick proposed by their prisoners' representative.

(3) Wounded and sick proposed by the Power on which they depend, or by an organization duly recognized by the said Power and giving assistance to the prisoners.

Prisoners of war who do not belong to one of the three foregoing categories may nevertheless present themselves for examination by Mixed Medical Commissions, but shall be examined only after those belonging to the said categories.

The physician or surgeon of the same nationality as the prisoners who present themselves for examination by the Mixed Medical Commission, likewise the prisoners' representative of the said prisoners, shall have permission to be present at the examination.

ARTICLE 114

Prisoners of war who meet with accidents shall, unless the injury is self-inflicted, have [*85] the benefit of the provisions of this Convention as regards repatriation or accommodation in a neutral country.

ARTICLE 115

No prisoner of war on whom a disciplinary punishment has been imposed and who is eligible for repatriation or for accommodation in a neutral country, may be kept back on the plea that he has not undergone his punishment.

Prisoners of war detained in connection with a judicial prosecution or conviction and who are designated for repatriation or accommodation in a neutral country, may benefit by such measures before the end of the proceedings or the completion of the punishment, if the Detaining Power consents.

Parties to the conflict shall communicate to each other the names of those who will be detained until the end of the proceedings or the completion of the punishment.

ARTICLE 116

The cost of repatriating prisoners of war or of transporting them to a neutral country shall be borne, from the frontiers of the Detaining Power, by the Power on which the said prisoners depend.

ARTICLE 117

No repatriated person may be employed on active military service.

SECTION II

RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE CLOSE OF HOSTILITIES

ARTICLE 118

Prisoners of war [*86] shall be released and repatriated without delay after the cessation of active hostilities.

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

The costs of repatriation of prisoners of war shall in all cases be equitably apportioned between the Detaining Power and the Power on which the prisoners depend. This apportionment shall be carried out on the following basis:

(a) If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.

(b) If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners [*87] of war depend. The Parties concerned shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war.

ARTICLE 119

Repatriation shall be effected in conditions similar to those laid down in Articles 46 to 48 inclusive of the present Convention for the transfer of prisoners of war, having regard to the provisions of Article 118 and to those of the following paragraphs.

On repatriation, any articles of value impounded from prisoners of war under Article 18, and any foreign currency which has not been converted into the currency of the Detaining Power, shall be restored to them. Articles of value and foreign currency which, for any reason whatever, are not restored to prisoners of war on repatriation, shall be despatched to the Information Bureau set up under Article 122.

Prisoners of war shall be allowed to take with them their personal effects, and any correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of repatriation so require, to what each prisoner can [*88] reasonably carry. Each prisoner shall in all cases be authorized to carry at least twenty-five kilograms.

The other personal effects of the repatriated prisoner shall be left in the charge of the Detaining Power which shall have them forwarded to him as soon as it has concluded an agreement to this effect, regulating the conditions of transport and the payment of the costs involved, with the Power on which the prisoner depends.

Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence.

Parties to the conflict shall communicate to each other the names of any prisoners of war who are detained until the end of the proceedings or until punishment has been completed.

By agreement between the Parties to the conflict, commissions shall be established for the purpose of searching for dispersed prisoners of war and of assuring their repatriation with the least possible delay.

SECTION III

DEATH OF PRISONERS OF WAR

ARTICLE 120

Wills of prisoners of war shall be drawn up [*89] so as to satisfy the conditions of validity required by the legislation of their country of origin, which will take steps to inform the Detaining Power of its requirements in this respect. At the request of the prisoner of war and, in all cases after death, the will shall be transmitted without delay to the Protecting Power; a certified copy shall be sent to the Central Agency.

Death certificates, in the form annexed to the present Convention, or lists certified by a responsible officer, of all persons who die as prisoners of war shall be forwarded as rapidly as possible to the Prisoner of War Information Bureau established in accordance with Article 122. The death certificates or certified lists shall show particulars of identity as set out in the third paragraph of Article 17, and also the date and place of death, the cause of death, the date and place of burial and all particulars necessary to identify the graves.

The burial or cremation of a prisoner of war shall be preceded by a medical examination of the body with a view to confirming death and enabling a report to be made and, where necessary, establishing identity.

The detaining authorities shall ensure that prisoners of [*90] war who have died in captivity are honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected suitably maintained and marked so as to be found at any time. Wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place.

Deceased prisoners of war shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his express wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased.

In order that graves may always be found, all particulars of burials and graves shall be recorded with a Graves Registration Service established by the Detaining Power. Lists of graves and particulars of the prisoners of war interred in cemeteries and elsewhere shall be transmitted to the Power on which such prisoners of war depended. Responsibility for the care of these graves and for records of any subsequent moves of the bodies shall rest on the [*91] Power controlling the territory, if a Party to the present Convention. These provisions shall also apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

ARTICLE 121

Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. Statements shall be taken from witnesses, especially from those who are prisoners of war, and a report including such statements shall be forwarded to the Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all measures for the prosecution of the person or persons responsible.

PART V

INFORMATION BUREAUX AND RELIEF SOCIETIES FOR PRISONERS OF WAR

ARTICLE 122

Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall institute an official Information Bureau for prisoners [*92] of war who are in its power. Neutral or non-belligerent Powers who may have received within their territory persons belonging to one of the categories referred to in Article 4, shall take the same action with respect to such persons. The Power concerned shall ensure that the Prisoners of War Information Bureau is provided with the necessary accommodation, equipment and staff to ensure its efficient working. It shall be at liberty to employ prisoners of war in such a Bureau under the conditions laid down in the Section of the present Convention dealing with work by prisoners of war.

Within the shortest possible period, each of the Parties to the conflict shall give its Bureau the information referred to in the fourth, fifth and sixth paragraphs of this Article regarding any enemy person belonging to one of the categories referred to in Article 4, who has fallen into its power. Neutral or non-belligerent Powers shall take the same action with regard to persons belonging to such categories whom they have received within their territory.

The Bureau shall immediately forward such information by the most rapid means to the Powers concerned, through the intermediary of the Protecting Powers [*93] and likewise of the Central Agency provided for in Article 123.

This information shall make it possible quickly to advise the next of kin concerned. Subject to the provisions of Article 17, the information shall include, in so far as available to the Information Bureau, in respect of each prisoner of war, his surname, first names, rank, army, regimental, personal or serial number, place and full date of birth, indication of the Power on which he depends, first name of the father and maiden name of the mother, name and address of the person to be informed and the address to which correspondence for the prisoner may be sent.

The Information Bureau shall receive from the various departments concerned information regarding transfers, releases, repatriations, escapes, admissions to hospital, and deaths, and shall transmit such information in the manner described in the third paragraph above.

Likewise, information regarding the state of health of prisoners of war who are seriously ill or seriously wounded shall be supplied regularly, every week if possible.

The Information Bureau shall also be responsible for replying to all enquiries sent to it concerning prisoners of war, including those [*94] who have died in captivity; it will make any enquiries necessary to obtain the information which is asked for if this is not in its possession.

All written communications made by the Bureau shall be authenticated by a signature or a seal.

The Information Bureau shall furthermore be charged with collecting all personal valuables, including sums in currencies other than that of the Detaining Power and documents of importance to the next of kin, left by prisoners of war who have been repatriated or released, or who have escaped or died, and shall forward the said valuables to the Powers concerned. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by statements giving clear and full particulars of the identity of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Other personal effects of such prisoners of war shall be transmitted under arrangements agreed upon between the Parties to the conflict concerned.

ARTICLE 123

A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned [*95] the organization of such an Agency.

The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of

war or to the Power on which they depend. It shall receive from the Parties to the conflict all facilities for effecting such transmissions.

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross or of the relief societies provided for in Article 125.

ARTICLE 124

The national Information Bureaux and the Central Information Agency shall enjoy free postage for mail, likewise all the exemptions provided for in Article 74, and further, so far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

ARTICLE 125

Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet [*96] any other reasonable need, the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive from the said Powers, for themselves and their duly accredited agents, all necessary facilities for visiting the prisoners, for distributing relief supplies and material, from any source, intended for religious, educational or recreative purposes, and for assisting them in organizing their leisure time within the camps. Such societies or organizations may be constituted in the territory of the Detaining Power or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the effective operation of adequate relief to all prisoners of war.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.

As soon as relief supplies or material intended for the above-mentioned purposes are handed over to prisoners of war, or [*97] very shortly afterwards, receipts for each consignment, signed by the prisoners' representative, shall be forwarded to the relief society or organization making the shipment. At the same time, receipts for these consignments shall be supplied by the administrative authorities responsible for guarding the prisoners.

PART VI

EXECUTION OF THE CONVENTION

SECTION I

GENERAL PROVISIONS

ARTICLE 126

Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They

shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, [*98] and then only as an exceptional and temporary measure.

The Detaining Power and the Power on which the said prisoners of war depend may agree, if necessary, that compatriots of these prisoners of war be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.

ARTICLE 127

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.

ARTICLE 128

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during [*99] hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

ARTICLE 129

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit [*100] by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

ARTICLE 130

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

ARTICLE 131

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

ARTICLE 132

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, [*101] the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

SECTION II

FINAL PROVISIONS

ARTICLE 133

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

ARTICLE 134

The present Convention replaces the Convention of July 27, 1929, in relations between the High Contracting Parties.

ARTICLE 135

In the relations between the Powers which are bound by the Hague Convention respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and which are parties to the present Convention, this last Convention shall be complementary to Chapter II of the Regulations annexed to the above-mentioned Conventions of the Hague.

ARTICLE 136

The present Convention, which bears the date of this day, is open to signature until February 12, 1950, in the name of the Powers represented at the Conference which [*102] opened at Geneva on April 21, 1949; furthermore, by Powers not represented at that Conference, but which are parties to the Convention of July 27, 1929.

ARTICLE 137

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

ARTICLE 138

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

ARTICLE 139

From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

ARTICLE 140

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions [*103] to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

ARTICLE 141

The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

ARTICLE 142

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect [*104] only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

ARTICLE 143

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

IN WITNESS WHEREOF the undersigned, having deposited their respective full powers, have signed the present Convention.

DONE at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

PEOPLE'S REPUBLIC OF ALBANIA

Mr. MALO, First Secretary to the Albanian Legation in Paris:

(1) Convention for the Amelioration of the Condition of the Wounded and Sick [*105] in Armed Forces in the Field.

Article 10: "The People's Republic of Albania will not recognize a request by a Detaining Power to a humanitarian organization or to a neutral State to take the place of a Protecting Power, as being in order, unless the Power of which the protected persons are nationals has given its consent."

(2) Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

Article 10: "The People's Republic of Albania will not recognize a request by a Detaining Power to a humanitarian organization or to a neutral State to take the place of a Protecting Power, as being in order, unless the Power of which the protected persons are nationals has given its consent."

(3) Convention relative to the Treatment of Prisoners of War.

Article 10: "The People's Republic of Albania will not recognize a request by a Detaining Power to a humanitarian organization or to a neutral State to take the place of a Protecting Power, as being in order, unless the Power of which the prisoners of war are nationals has given its consent."

Article 12: "The People's Republic of Albania considers that in the case of prisoners [*106] of war being transferred to another Power by the Detaining Power the responsibility for the application of the Convention to such prisoners of war will continue to rest with the Power which captured them."

Article 85: "The People's Republic of Albania considers that persons convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, of war crimes and crimes against humanity, must be treated in the same manner as persons convicted in the country in question. Albania does not therefore consider herself bound by Article 85 so far as the category of persons mentioned in the present reservation is concerned."

(4) Convention relative to the Protection of Civilian Persons in Time of War.

Article 11: "The People's Republic of Albania will not recognize a request by a Detaining Power to a humanitarian organization or to a neutral State to take the place of a Protecting Power, as being in order, unless the Power of which the protected persons are nationals has given its consent."

Article 45: "The People's Republic of Albania considers that in the case of protected persons being transferred to another Power by the Detaining Power, [*107] the responsibility for the application of the Convention to such protected persons will continue to rest with the Detaining Power."

ARGENTINA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI,	)	
ESAM FOUAD HAMDI, As Next Friend of Yaser Esam Hamdi,	)	
Petitioners,	)	
v.	)	CASE NO. 2:02CV439
DONALD RUMSFELD, Secretary of Defense	)	
COMMANDER W.R. PAULETTE, Norfolk Naval Brig	)	
Respondents.	)	

DECLARATION OF FRANK W. DUNHAM, JR.

1. My name is Frank W. Dunham, Jr., and I am the Federal Public Defender for the Eastern District of Virginia. I currently represent Yaser Esam Hamdi who is being held in the Naval Brig in Norfolk.

2. I have been in communication with Attorney Tony West, counsel for John Walker Lindh, an American citizen and defendant charged generally in this district with Title 18 offenses

after being captured with a Taliban unit in Afghanistan. (*See United States v. John Phillip Walker Lindh*, Crim. No. 02-37-A, Alexandria Division). To the extent further detail on this case is required, it is respectfully suggested that this Court take notice of its own proceedings.

3. As a result of direction from Judge Ellis in *Lindh* (*see* attached transcript excerpts), I was contacted by Tony West in late May or early June of this year. Mr. West wanted my permission to speak to Mr. Hamdi.

4. Mr. West explained at that time, and has recently reaffirmed in more detail, that he wanted to speak to Mr. Hamdi because he was provided by the government with statements and/or government summaries of statements attributed to Mr. Hamdi which were deemed by the government and the Court in *Lindh* to be exculpatory to Mr. Lindh on the issues of:

a. whether Mr. Lindh was an enemy combatant;

b. whether Mr. Lindh bore arms against Americans;

c. whether Mr. Lindh was part of an uprising of prisoners captured by the Northern Alliance.

5. Mr. West could not tell me what specifically was in the statements because he is subject to a protective order, but he says they are definitely not classified. While unable to provide detail, he did say that since these statements were clearly exculpatory to *Lindh* on these particular issues, it might not be unreasonable to infer that they are equally exculpatory in nature to *Hamdi* on these issues.

6. *Lindh* counsel advises that while Mr. Lindh has firsthand knowledge concerning Mr. Hamdi, he cannot be interviewed by third parties due to the Special Administrative Measures under which he is being detained.

FRANK W. DUNHAM, JR.

Judge Ellis re Yaser Hamdi
8/9/02 5:00:05 PM Eastern Daylight Time
KEfigenio@molo.com (Efigenio, Kerry A.)
tdunham@aol.com

Dunham, here is excerpts from the 5/28 and 5/31 court hearings regarding Mr. Hamdi.

Efigenio
315-268-7210

esday, May 28, 2002

ATTORNEY HARRIS: His name is Isaam Hamdi (phonetic), and he has been the subject of a government report that has been produced under Brady as material and

exculpatory.

THE COURT: Yes. Well, I think I recall the report, but I don't recall that he was in Norfolk. Is that where he is now?

ATTORNEY DAVIS: Yes, your Honor.

THE COURT: I take it time he is not charged or indicted at this time.

ATTORNEY DAVIS: I'm sorry, your Honor?

THE COURT: He is not charged and indicted at this time?

ATTORNEY DAVIS: That's correct. He does continue to be viewed as an enemy combatant, and in that way is like the other detainees. That is, he has -- well, I believe he has joint Saudi/U.S. citizenship, and was, for all intents and purposes, a Saudi combatant in

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Afghanistan, like many of the others.

THE COURT: Well, I told you before I have never understood this dual citizenship. I know it has some sanction in some of the cases. But every time I administer the oath of citizenship to new citizens once a month, they have to give up, renounce, abjure all of their fidelity and loyalty to any other prince or potentate, and have to give up their passports.

I don't see how you can be a citizen of this country and some other country. Maybe some other countries can see it, but I don't. In any event, that's not relevant at this time.

He is not to be moved, is he, from Virginia?

ATTORNEY DAVIS: No; at least now, no, your

Honor.

THE COURT. All right. Well, Mr. Harris would like to talk to him, I am sure.

Is that right, Mr. Harris?

ATTORNEY HARRIS: Yes, your Honor.

THE COURT. And I want to know why he shouldn't be able to talk to him, since he is in Virginia, and none of the arguments you've made elaborately ly and forcefully in the other pleadings apply to him.

THE COURT: Well, let me suggest to you, and you can take it as a direction, that counsel in

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Norfolk advise the Court of this issue and that I want it resolved promptly; not that that tells the Norfolk judge that the Norfolk judge needs to do anything, but that I am going to resolve this issue promptly.

And the fact that the district judge in Norfolk may take it under advisement is entirely up to the district judge there. But I am not sure that it makes a big difference to me.

This person is probably down at the naval operating base in a brig, right?

ATTORNEY DAVIS: I think so, your Honor. Yes.)

THE COURT: Well, that's under the Department of Defense custody. And unless I am really moved by some reason why the national security is really affected by having Mr. Harris go down and meet with him,

I am likely to let it happen, whether he has a lawyer or not.

Now, this person can always decline to be interview. That's his right. Mr. Harris doesn't have any absolute right to talk to anybody. People can refuse to do it.

That's one of the advantages, as you point out, to the system that you suggest. As a practical matter, I don't know how big an advantage. I doubt that any of the detainees at Guantanamo Bay would refuse an opportunity to talk to anybody outside. That's what the manual says, and I think the manual has got the right

picture of the American justice system in that regard.

==========

THE COURT: All right, the record will reflect that this is United States against John Walker Lindh and that counsel are present and prepared to proceed.

Let me begin first with the Government's response. The Government, in compliance with the Court's direction, has filed a pleading reflecting the results of a hearing in Norfolk relating to Yaser Hamdi.

And, Mr. Bellows or Mr. Davis, whoever is going to address this -- Mr. Davis?

MR. DAVIS: Yes, Your Honor.

THE COURT: Mr. Davis, I take it that Judge Doumar has appointed Mr. Dunnam to represent Mr. Hamdi, and the Government is considering whether to seek relief from that order?

MR. DAVIS: That's correct, Your Honor. The order of May 29th does appoint Mr. Dunnam in the Federal Public Defender's office as counsel for Mr. Hamdi.

THE COURT: All right, now it seems to the Court that there are two separate considerations. One is whether defense counsel here can interview Mr. Hamdi, and that's, of course, at least for the time being a matter that they are free to pursue with Mr. Dunham directly. There is no reason why Mr. Harris or Mr. Brosnahan can't call Mr. Dunnam.

I think you might be willing to predict with some confidence what the results of that would be, but nonetheless there is no reason why they shouldn't contact him, is there?

THE COURT: So the matter is really premature at this time as to whether any subpoena is appropriately issued to that person, but I don't see any reason why you can't contact Mr. Dunham and talk to him about gaining access to Mr. Hamdi.

Mr. Dunham may well tell you, the answer is no for

the time being. We'll wait until the Government appeal is over, and I will consider it again. I don't know what he is going to tell you, but that's predictable. But the subpoena itself seems premature.

Mr. Harris, do you want to address that, or Mr. Brosnahan?

THE COURT: Well, Mr. Harris, it seems to me it's still premature. You can subpoena him, and I'll consider whether there is an objection to the subpoena at the appropriate time, and we will take it up.

In the meantime, if you want access to him, try Mr. Dunham. There is no reason why you can't call Mr. Dunham, but we will see whatever he says. He may not represent him for very long. I don't know. I don't know what the status of that will ultimately be.

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U.S.-BORN TALIBAN HELD IN NORFOLK

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NORFOLK - A military jail at Norfolk Naval Station became the home Friday for an American-born man captured in Afghanistan as U.S. officials continued to wrestle with his legal status.

On a sunny but brisk afternoon, Yasser Esam **Hamdi**, 22, arrived at 2:15 at the base's Chambers Field. He was placed in a green government minivan with tinted windows and driven down Hampton Boulevard by military police escort, a short ride from the airstrip to the base's brig, officials confirmed. All day, access to the two-building compound ringed by barbed wire was blocked by armed guards and barricades on the entrance road.

Hamdi was seized by U.S. forces with fighters of the ruling Taliban militia and the al-Qaida terror network after a November prison uprising in the northern Afghan town of Mazar-e Sharif.

"Given the likelihood that **Hamdi** is an American citizen, it was deemed appropriate to move him to the United States," said Lt. Cmdr. Jeff Davis, a Pentagon spokesman. "As a captured enemy combatant, **Hamdi** remains in the control of the Department of Defense."

Hamdi left the U.S. naval base at Guantanamo Bay, **Cuba**, aboard a C-130 transport plane early Friday. His plane touched down at Dulles International Airport shortly after noon and took off again about 90 minutes later.

He had been at Guantanamo Bay since Feb. 11.

Officials did not explain why **Hamdi** was flown to Dulles and then moved to Norfolk.

No civilian criminal charges have been filed against **Hamdi**.

A Justice Department official said no decision has been made on

how to handle **Hamdi**'s legal status. Options include possible federal criminal charges or seeking a trial by military tribunal.

That decision is "a long way off," said the official, speaking on condition of anonymity.

Gen. Tommy Franks, commander of U.S. forces in Afghanistan, told reporters Friday that because **Hamdi** spoke English when he was captured, officials knew there was a possibility he might be American. Franks said the matter had not been resolved when **Hamdi** was transferred to Guantanamo Bay along with other prisoners captured in Afghanistan.

If federal charges are brought, **Hamdi** would be tried in one of the four U.S. District Courts in the Eastern District of Virginia - Alexandria, Newport News, Norfolk or Richmond. Federal law mandates that anyone charged with a federal crime who is brought into the country from a foreign nation must be tried in the district where the plane touches down.

While Alexandria seems the likely court of choice, the Norfolk court could still be an option because **Hamdi** will be housed nearby at the naval base, officials said. It was unclear why the Norfolk brig was chosen rather than a military confinement facility closer to Alexandria. The Marine Corps, for example, has a brig at Quantico, roughly 30 miles from the Alexandria courthouse, though it is certified to hold prisoners for no more than 90 days at a time.

Though the Washington area is home to a variety of military bases, another defense official suggested that the brig at Norfolk Naval Station is the closest military facility to Alexandria with the kind of security arrangements needed for a prisoner like **Hamdi**. Holding him there would facilitate a transfer to Justice Department custody when the proper time for that comes, the official said.

One official said Navy leaders had been told to prepare for **Hamdi**'s arrival in Norfolk but given no indication of how long he might be staying. The Norfolk brig can officially hold 145 prisoners.

"It's hardly state of the art," said Virginia Beach attorney Greg D. McCormack, who specializes in handling military cases. McCormack and another lawyer familiar with the facility described the brig's security as tight.

The brig, which opened in 1972 as the Naval Station Correctional Center, is located on an unsecured portion of the Norfolk base, well outside the gates and fencing that surround

the rest of the base. Just off Ingersoll Road, the three-story facility sits northwest of Camp Allen Elementary School and is visible from Interstate 564.

In 1973, the brig had a riot in which a dozen prisoners reportedly took over sections of the jail.

The brig is certified to confine prisoners from all branches of the armed services and also operates a correctional custody unit, which can hold 20 male and 10 female prisoners. That unit is designed to provide training and regimentation to junior sailors and return them to their units to complete their enlistments.

According to a Navy Web site, the brig's staff includes three officers, 120 enlisted sailors and six civilian employees.

McCormack, the lawyer, said the facility has a solitary-confinement block with about six, single-occupancy cells. Prisoners facing the most-serious charges are confined in those windowless cells, he said.

Typically, prisoners awaiting military trials known as courts-martial and those convicted and sentenced to prison terms of less than 36 months are held in the Norfolk brig, McCormack said.

A defense official suggested that the military would have preferred to turn **Hamdi** over to federal marshals, but the Justice Department was not prepared to move forward with charges.

John Walker Lindh, a former Californian who was dubbed "American Taliban," was captured at the same Afghan prison as **Hamdi** and awaits trial in Alexandria.

Lindh never was held at Guantanamo Bay. After being taken aboard a Navy ship in the Arabian Sea in November, he was flown Jan. 23 to Alexandria. He is charged with conspiring to murder Americans, providing support and services to foreign terrorist organizations, including al-Qaida, and using firearms and destructive devices during crimes of violence.

Before deciding **Hamdi**'s citizenship claims, Justice Department officials were reportedly researching whether he had ever sought dual citizenship or renounced his American citizenship.

Justice Department officials recently located a birth certificate backing up **Hamdi**'s claim that he was born in Baton Rouge, La., in 1979, while his Saudi parents worked there. He went to Saudi Arabia with his parents while still a toddler, Pentagon spokeswoman Victoria Clarke said Thursday.

Clarke said she did not know when **Hamdi** initially told U.S officials of his claim to American citizenship.

Reach Matthew Dolan at mdolan(AT)pilotonline.com or 446-2322. **Description of illustration(s):**
STEVE EARLEY PHOTOS/THE VIRGINIAN-PILOT
Military police escort a minivan transporting suspected American Taliban Yasser Esam **Hamdi** down Hampton Boulevard to the brig at the
Norfolk Naval Station on Friday. No decision has been made on how to
handle **Hamdi**'s legal status.

A Norfolk Naval Station police officer provides security as a motorcade carries the American Taliban suspect to the brig on Friday. The suspect was flown from Guantanamo Bay, Cuba, earlier in
the day.

COLOR PHOTOS
GENEVIEVE ROSS/THE VIRGINIAN-PILOT
IN NORFOLK: Armed guards block the road leading to the Norfolk Naval
Station brig, where American-born Taliban fighter Yasser Esam **Hamdi**,
22, was moved Friday.

TERRY RICHARDS/NEWS GROUP NEWSPAPERS LTD.
IN AFGHANISTAN: A Taliban prisoner identified as Yasser Esam **Hamdi**
is shown in December in Mazar-e Sharif following his capture. **Hamdi**
was eventually sent on to the U.S. detention center at Guantanamo
Bay, Cuba, before being moved Friday to the Norfolk Naval Station
brig. A birth certificate backs up **Hamdi**'s claim that he was born in
the United States.

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Thursday, August 8, 2002

Politics & Policy

More Terror Suspects May Sit in Limbo

White House Seeks to Expand Indefinite Detentions in Military Brigs, Even for U.S. Citizens

By Jess Bravin

Washington – SUSPECTED TERRORISTS Jose Padilla and Yaser Hamdi – U.S. citizens being held in stateside Navy brigs without bail, charges, access to attorneys or the right to remain silent – may soon have company.

Stung by the courtroom circus that yet another accused terrorist, Zacarias Moussaoui, has created, and the aggressive defense marshaled by John Walker Lindh before he plea-bargained his way out of a possible life sentence, the Bush administration is preparing to expand its policy of indefinitely detaining in U.S. military jails people it designates as "enemy combatants." Such prisoners – whether Americans or foreigners captured in the U.S. – aren't afforded the same constitutional rights as criminal defendants, or even the limited rights allowed in military tribunals.

The White House is considering creating a high-level committee to decide which prisoners should be denied access to federal courts. The Goose Creek, S.C., facility that houses Mr. Padilla – mostly empty since it was designated in January to hold foreigners captured in the U.S. and facing military tribunals – now has a special wing that could be used to jail about 20 U.S. citizens if the government were to deem them enemy combatants, a senior administration official said.

U.S. citizens or aliens arrested on American soil have better claims to constitutional rights than the foreigners captured overseas who are being held at the U.S. Guantanamo Bay Naval Base in Cuba. This year, two federal judges have ruled that the Guantanamo detainees have no right to seek freedom in U.S. courts.

Raising the stakes this week in what could become a constitutional showdown, the administration refused a federal court's order to turn over intelligence documents related to the capture of Mr. Hamdi, who is imprisoned in Norfolk, Va., claiming the judge lacked the authority on procedural grounds. It also is trying to get his public defender removed from the case. Officials said they selected brigs in South Carolina and Virginia partly because they fall under the jurisdiction of courts that are more conservative and presumably more sympathetic to the administration. The Padilla case is being handled by a judge in New York, where a grand jury has been investigating terrorist activity, but the administration wants it transferred to Charleston, S.C.

The moves are part of a fierce fight the administration is waging to establish precedents in the two cases that would allow it to indefinitely detain more people it designates as wartime foes. The issues seem destined for the Supreme Court, which has a mixed record on such matters. During the Civil War, it barred the military detention of noncombatant Americans when federal courts are functioning, but it upheld the roundup of 120,000 Japanese-Americans and the secret trial and execution of Nazi saboteurs during World War II.

"There's a different legal regime that we're developing" to confront terrorism, a senior official said, melding the once-separate realms of civilian law and the law of war. Criminal law determines guilt and assigns punishment for past wrongdoing, but the law of war gives governments vast powers to prevent possible harm by imprisoning and interrogating enemy soldiers.

Does that mean future Moussaouis won't face civilian trials? "Not if we can help it," said a White House official.

Some in Congress consider the policy misguided. "The fact that somebody is despicable . . . is not enough under the tradition and history of this country to imprison them forever without them ever having a hearing," said Sen. John Edwards, a North Carolina Democrat.

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8/8/02 WSJ A4
8/8/02 Wall St. J. A4
2002 WL-WSJ 3402993

Critics point to Japanese-American internments that bars imprisoning citizens without charges to an act of Congress. The administration argues that the law doesn't apply to enemy combatants.

Attorney General John Ashcroft said last month that courts could hear petitions filed for such prisoners. But in papers filed Tuesday in the Hamdi case, the Justice Department argued for the narrowest possible review, saying a signed Pentagon declaration that Mr. Hamdi is an enemy combatant should settle the matter.

At the outset of the campaign against al Qaeda, the international Islamist network organized by Osama bin Laden, career federal prosecutors maintained that they are best suited to deal with terrorists. But the Moussaoui and Lindh cases soured top officials on that route.

After dropping the most serious charges against Mr. Lindh, prosecutors agreed to let him to plead guilty to aiding the enemy in Afghanistan, and he now faces 20 years in prison. But the elaborate defense put up by the Californian's lawyers drained government resources and threatened to expose intelligence, military techniques and personnel, and even to bring al Qaeda battlefield prisoners to the witness stand in the Alexandria, Va., federal courthouse. Mr. Moussaoui, a French citizen captured in Minnesota while allegedly conspiring to take part in the Sept. 11 plot, is representing himself and flooding the same court with bizarre and accusatory motions aimed at glorifying Mr. bin Laden.

By the time Mr. Padilla, an American from Chicago, was arrested in May, the administration already had tired of such games. Mr. Padilla is a onetime gang member who converted to Islam in the early 1990s. He was arrested after returning from Pakistan, where he allegedly took part in an al Qaeda plot to detonate a "dirty bomb" that would spread radioactive material in the U.S.

Originally jailed on a secret "material witness" warrant, Mr. Padilla was transferred to military custody on the eve of a hearing where a court-appointed lawyer was to seek his freedom. President Bush personally approved Mr. Padilla's transfer, but officials said they are considering procedures that wouldn't require presidential involvement in future cases.

Under one proposal, a committee of the attorney general, the defense secretary and the director of central intelligence would determine whether a U.S. citizen should go to military detention. If the prisoner were foreign, the national-security adviser also would be involved.

At least two prisoners now held as material witnesses could be candidates for combatant classification.

– James Ujaama, a U.S. citizen from Seattle, was arrested last month as part of an investigation into alleged plans to set up an al Qaeda-linked training camp in rural Oregon. He is jailed in Alexandria.

– Mohammed Mansour Jabarah, a Kuwaiti-born Canadian citizen, was arrested in Oman and turned over to the U.S. after allegedly plotting to blow up U.S. and Israeli embassies in Singapore. He is being held at Fort Hamilton in Brooklyn, N.Y., according to an administration official.

In Hanahan, S.C., next door to Mr. Padilla's brig, residents have their own concerns. "I didn't know they could lock you up without a trial," says Charles Bates, a retired shipyard worker whose house abuts the naval facility. His greater concern, however, is the possibility of retaliatory terrorist strikes against his town. "It's not helping the value of our property, having that brig there," he adds.

— INDEX REFERENCES —

NEWS SUBJECT: Defense Department; Armed Forces; Executive Government; Justice Department; September 11 Terrorist Attacks; Crime; Crime/Courts; Wall Street Journal; English language content; Domestic Politics; Political/General News; Politics; Acts Of Terror; Military Action; Government Bodies (GVDEF GDEF GVEXE GVJUS 911 CRM GCRIM WSJ ENGL GPOL GCAT PLT GTERR MLT GVBOD)

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The Washington Post

AN INDEPENDENT NEWSPAPER

Why Mr. Hamdi Matters

CONSIDERING what is known about Yaser Esam Hamdi, it is easy to lose sight of why his case is so important. The government claims that Mr. Hamdi—the Louisiana-born, Saudi-raised and likely American citizen who is currently being held indefinitely without charge or access to counsel in a military brig in Norfolk—is an enemy combatant. He was, the government says, captured when the Taliban unit to which he was attached surrendered to the Northern Alliance, and he has allegedly admitted to government investigators that he went to Afghanistan to train with and, if necessary, fight for the Taliban. His father's claim, made in a letter last week to members of Congress, that his son went as a relief worker is being greeted with skepticism. Mr. Hamdi is, in short, hardly a sympathetic character. Many Americans will be tempted to conclude that if people like him cannot be locked up easily, there must be some problem with the rules.

A remarkable story in Thursday's Wall Street Journal shows why this instinct may be wrong and why it is essential that the government be required to justify persuasively "enemy combatant" designations. The White House, the Journal reported, has become dismayed by the legal circus of the Zacarias Moussaoui trial and the strong defense put forth for John Walker Lindh. In reaction, it has determined that, rather than pursue civilian trials, the government should—assuming it prevails in the Hamdi and Jose Padilla cases—use enemy combatant detentions instead. A wing of a navy brig in Goose Creek, S.C., where Mr. Padilla—held in connection with an alleged dirty bomb plot—now resides, is available for Americans subject to military detentions. And a high-level committee, composed of the attorney general, the defense secretary and the CIA director—is being contemplated to decide which American citizens should be locked up with no rights. The White House did not

nor did it comment upon the accuracy of the Journal's story.

The government is right to worry about the chaos the Moussaoui trial has produced, which has been both dangerous and embarrassing. And few doubt that the military has the authority to detain enemy combatants—a long-standing feature of the laws of war. But the idea of using enemy combatant designations of citizens as a relatively routine means of handling terrorism cases is appalling. A cardinal protection of liberty in this country is the requirement that the government justify deprivations of freedom. Yet the emerging hallmark of the enemy combatant cases is the unwillingness of the government to do precisely that. In Mr. Hamdi's case, the Justice Department initially argued that its designation was unreviewable by any court. Even now, after an appeals court cast doubt on that position, the government contends that the courts should not look beyond the sketchiest of evidentiary statements it has offered in justifying its view of Mr. Hamdi. Creating a regime under which these detentions would be a norm, rather than an extraordinary exception, would be extremely dangerous.

For this reason, it is critical that judges remember how the doctrine they are creating could be used against people other than the ones whose cases they are currently seeing. The government's case against Mr. Hamdi may be solid. But if it is allowed to detain him without some procedure that requires a persuasive showing, it will create a rule that allows Americans to be exempted from the protections of the Bill of Rights on the strength of a two-page statement the government condescends to present in court. A goodly number of people in this country have controversial political beliefs or associate with people who might turn out to be terrorists. Whatever process is used to lock up Americans must be capable of distinguishing

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI as next friend of YASER ESAM HAMDI,

Petitioners,

v.

DONALD H. RUMSFELD, Secretary of Defense, and COMMANDER W. R. PAULETTE, Norfolk Naval Brig, Norfolk, Virginia,

Respondents.

CIVIL ACTION
NO. 2:02cv439

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

August 13, 2002

Before: THE HONORABLE ROBERT G. DOUMAR
United States District Judge

COPY

Appearances:

FEDERAL PUBLIC DEFENDER
By: FRANK W. DUNHAM, JR., ESQUIRE
LARRY M. SHELTON, ESQUIRE
GEREMY C. KAMENS, ESQUIRE
Counsel for the Petitioners

DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
By: GREGORY GEORGE GARRE, ESQUIRE
and
UNITED STATES ATTORNEY'S OFFICE
By: LAWRENCE R. LEONARD, ESQUIRE
Counsel for the Respondents

THE CLERK: Case number 2:04cv439, Yaser Esam Hamdi, et al. versus Donald H. Rumsfeld and Commander W. R. Paulette.

Mr. Dunham, is the petitioner ready to proceed?

MR. DUNHAM: We are, Your Honor.

THE CLERK: Mr. Garre, are the respondents ready?

MR. GARRE: Yes, we are, Your Honor.

THE COURT: This case does represent a balance that must be struck between the executive's authority in times of conflict and the procedural safeguards that our Constitution provides for U. S. citizens that are detained on United States soil.

This court recognizes, and the Fourth Circuit has made clear, that the government is entitled to considerable deference in detention decisions during hostilities; however, the Fourth Circuit in declining to dismiss the case also stated that it refused to summarily embrace the sweeping proposition that any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so.

In addition, I had previously issued some orders trying to find certain information; however, on August the 8th the Court of Appeals held, in accordance with the principles set forth in an opinion of July the 12th the District Court shall consider the sufficiency of the Mobbs' Declaration as an independent matter before proceeding further.

Interpreting this, it's clear that I can only interpret the Mobbs' Declaration to determine if it is sufficient. And that is what this proceeding is about. It's without the presence of Mr. Hamdi. It's without anyone talking to Mr. Hamdi. It's without Mr. Hamdi having a right to say anything. It is solely on the presentation of the executive that he is an unlawful enemy combatant, which they have alleged.

On that I will hear from Mr. Garre as to why he believes it is sufficient. And then I will hear from Mr. Dunham as to why he believes it's insufficient. And then I may question them both later.

All right, Mr. Garre.

MR. GARRE: Thank you, Your Honor.

Your Honor, the respondents' position is that the Mobbs' Declaration provides a factual basis for the military's determination that Mr. Hamdi is indeed an enemy combatant who was captured during the hostilities in Afghanistan and that the military's detention of Mr. Hamdi is therefore lawful. For those reasons we think the Court should grant the government's motion to dismiss the petition in this case.

Now, the Fourth Circuit's order asked the Court to inquire into the sufficiency of the Mobbs' Declaration. We think that the Mobbs' Declaration satisfies the limited standard of review that the Fourth Circuit recognized would

apply in this case consistent with the overarching separation of powers and principles which must inform proceedings such as this.

The Fourth Circuit's most recent decision in this case lays out what it calls cardinal principles that we think are particularly relevant to the inquiry that is now before the Court in this habeas petition. The habeas petition, of course, raises several purely legal issues with respect to whether or not Mr. Hamdi can be detained simply because he is an American citizen, whether or not the statute relied on by the petitioners, 18 U.S.C. 4001, presents a bar to Mr. Hamdi's detention. They raise certain other claims which in no way would require a court to consider even the sufficiency of the Mobbs' Declaration, to hear from Mr. Hamdi, to --

THE COURT: Do you think no one should even consider the sufficiency?

MR. GARRE: Excuse me, Your Honor?

THE COURT: Do you think no one should even consider the sufficiency?

MR. GARRE: We think the Court of Appeals has directed this court to consider that, and we think that's an appropriate inquiry under the Court's recent decision. I'm just trying to explain that there are several legal issues.

THE COURT: Let me ask you another question. Has the writ of habeas corpus been vacated?

MR. GARRE: It hasn't.

THE COURT: Is this a habeas corpus petition?

MR. GARRE: Your Honor, they have filed a habeas corpus petition.

THE COURT: Do you maintain that they can't?

MR. GARRE: Yes, we do, Your Honor. We've made clear in this case --

THE COURT: Has the President done anything to eradicate the habeas corpus?

MR. GARRE: No, Your Honor. In one of the claims they made --

THE COURT: Did Congress do anything to eradicate the habeas corpus?

MR. GARRE: No, Your Honor. One of the claims they made was the writ was suspended in this case. As far as I can tell, they have abandoned --

THE COURT: If the writ wasn't suspended, then why would just the decision of the executive be final?

MR. GARRE: Your Honor, the reason why the courts have a very limited role in this type of proceeding is because, as the Fourth Circuit recently stated, under our constitutional system the executive is the branch which is in the best position to make the military determinations necessary to the capture and detention of enemy combatants.

THE COURT: So the Constitution does not apply to Mr.

Hamdi is that correct?

MR. GARRE: Well, I think it applies to Mr. Hamdi as it did to the individual who was alleged to be an American citizen in the Quirin case. In that case the Supreme Court held -- and I think it's fair to say that the Court of Appeals in this case recognized --

THE COURT: Mr. Hamdi wasn't a spy. In the Quirin case we had people who came ashore to destroy the or to sabotage the United States in time of war and were not in uniform. They were unquestionably in the category of spies; isn't that correct?

MR. GARRE: That's correct in the Quirin case, Your Honor. This case involves the detention of the individual --

THE COURT: In the Quirin case did they have counsel?

MR. GARRE: Your Honor, that case involved military charges that were brought against the saboteurs that resulted in --

THE COURT: All I asked is did they have counsel?

MR. GARRE: As I understand it, they did for the limited purpose of the proceeding that resulted in --

THE COURT: Was counsel able to speak with them?

MR. GARRE: Yes, Your Honor.

THE COURT: Well, in --

MR. GARRE: But if I could --

THE COURT: Is there any case that you know of, any

habeas corpus petition that you've ever heard of, prior to this case where counsel could not speak to the person being held?

MR. GARRE: Your Honor, if I could answer that this way:

THE COURT: Just answer it. Have you ever heard of such a case? You can answer.

MR. GARRE: Neither side has pointed to authority directly on point, but if I could explain that, Your Honor, with respect --

THE COURT: I'm going to allow you to explain it.

MR. GARRE: Thank you.

THE COURT: But could you answer the question?

MR. GARRE: Yes.

THE COURT: The question is -- the answer is what?

MR. GARRE: The answer is no. Neither side has pointed to an authority directly on point that --

THE COURT: I didn't ask Mr. Dunnam. He may find some authority.

MR. GARRE: What the Fourth Circuit has said in this case, and I would direct the Court to that decision, is that if Mr. Hamdi is indeed an enemy combatant his detention, his present detention, is a lawful one. Now, during the argument in that case Chief Judge Wilkinson made an observation which is perfectly accurate. That's since time immemorial armies during warfare have captured and detained combatants in warfare. He

also made the following hypothetical, which I think is appropriate here.

THE COURT: Did this man -- I didn't hear anything in the Mobbs' Declaration that indicated that he fought anyone. Is there anything in the Mobbs' Declaration -- is there anything in here that says that Hamdi shot at anyone?

MR. GARRE: No, Your Honor.

THE COURT: Is there anything in here that said Hamdi ever fired a weapon?

MR. GARRE: Your Honor, what the Mobbs' Declaration says is that Hamdi --

THE COURT: Is there anything in the Mobbs' Declaration that says Hamdi ever fired a weapon?

MR. GARRE: Your Honor, the declaration does not say that. What it does say is that Mr. Hamdi surrendered with an enemy unit, surrendered his AK-47 to -- along with an enemy Taliban unit in Afghanistan during the period of hostilities.

THE COURT: I have it in front of me, so we'll discuss it piece by piece. First, let's discuss the question of the person who made this declaration. It says he is a special advisor.

Was he appointed by the President with the consent of the Senate?

MR. GARRE: That is my understanding, Your Honor.

THE COURT: He was?

MR. GARRE: That's my understanding.

THE COURT: He was appointed by the President with the consent of the Senate?

MR. GARRE: No, Your Honor. Actually, if I could clarify that, the Under Secretary --

THE COURT: So I could go on the computer and find out when the President appointed Mr. Mobbs with the consent of the Senate?

MR. GARRE: Your Honor, I apologize. I misunderstood your question. The Under Secretary of State for Policy --

THE COURT: I didn't ask you about the Under Secretary of State. I asked you about Mr. Mobbs.

MR. GARRE: Mr. Mobbs was not, Your Honor.

THE COURT: Was Mr. Mobbs a convening authority for general court-martial jurisdiction in the military?

MR. GARRE: I don't believe he was, Your Honor.

THE COURT: Was Mr. Mobbs -- does it appear in here anywhere that Mr. Mobbs was a commissioned officer of the United States?

MR. GARRE: It doesn't appear in the affidavit, Your Honor. Mr. Mobbs has reviewed --

THE COURT: Is Mr. Mobbs an employee of the United States?

MR. GARRE: Your Honor --

THE COURT: Or is he just a special advisor hired to

take a statement?

MR. GARRE: With respect, Your Honor, the declaration states that Mr. Mobbs is an employee of the United States, that he's a special advisor.

THE COURT: No, it does not. It says he's a special advisor to the Under Secretary of Defense for Policy, doesn't it?

MR. GARRE: It does, Your Honor.

THE COURT: It doesn't say he's a GS anything, does it?

MR. GARRE: It does not say that, Your Honor. It does say he has been substantially involved in the detainee operations and is familiar with the detainee operations involving the hostilities in Afghanistan, and --

THE COURT: So he is what one would call normally an expert; is that correct?

MR. GARRE: I don't know that he's being offered as an expert in the evidentiary sense, Your Honor. What he does --

THE COURT: Well, if he was offered as an expert, at least the Court could then decide under Daubert whether to accept his testimony or not; isn't that correct?

MR. GARRE: I suppose that's correct, Your Honor, if we were in a normal civil evidentiary proceeding, which I don't think that we are.

THE COURT: This isn't a normal evidentiary proceeding because this isn't a writ of habeas corpus? Habeas corpus isn't a normal proceeding?

MR. GARRE: Your Honor, this is a habeas proceeding. I don't think Your Honor referred to the rules governing experts who -- Mr. Mobbs hasn't been submitted as an expert in accordance with the civil rules.

THE COURT: So he isn't --

MR. GARRE: What he has been submitted, Your Honor, is to provide a factual basis for the military's determination Mr. Hamdi is indeed a military combatant. He does that, Your Honor. He lays down the criteria and the considerations on which the military relied in making that determination. He explains that Mr. Hamdi surrendered with an enemy unit. He explained Mr. Hamdi laid down his AK-47 with that unit.

THE COURT: I don't find the same explanations you do. Let's read the Mobbs' Declaration. Let's go down it paragraph by paragraph, Mr. Garre.

MR. GARRE: Yes, Your Honor.

THE COURT: Not what you interpret the paragraph here, but what the paragraphs say, okay?

He says Mr. Hamdi traveled to Afghanistan, doesn't he?

MR. GARRE: He does say that, Your Honor.

THE COURT: He says in approximately July or August

of 2001.

MR. GARRE: He does say that, Your Honor.

THE COURT: He says that he remained affiliated with a Taliban unit. What does affiliation mean?

MR. GARRE: Well, I think what he also says is --

THE COURT: He didn't say he was a member. He said he was "affiliated".

MR. GARRE: I want to stick to the terms of the affidavit, as Your Honor mentioned. He says in paragraph nine Mr. Hamdi's confirmed the fact he surrendered and gave his firearm to the Northern Alliance forces.

THE COURT: So if he -- any person who was in the area who has a firearm and gave it to the Northern Alliance forces -- we'll get to paragraph nine in a minute. Can we stick with paragraph three right now?

MR. GARRE: Your Honor, I'd like to answer the Court's questions consistent with the declaration. With respect, I think it's relevant to refer to --

THE COURT: You say number nine should be read with number three?

MR. GARRE: Your Honor, I think we should read the declaration as a whole. The question before the Court is the sufficiency of the declaration, not the sufficiency of any single sentence.

THE COURT: I understand that, Mr. Garre. Thank you.

All right. Now, let me ask you this question: They talk about the Northern Alliance. The Northern Alliance does contain certain units that were Taliban units; isn't that correct?

MR. GARRE: I don't know if that's factually correct.

THE COURT: So news accounts -- well, it's not in this report. Should I consider that, news accounts of that.

MR. GARRE: Certainly the Court of Appeals asked this court to consider the sufficiency of the declaration. I want to make this clear.

THE COURT: I won't consider that because it was just in newspaper accounts, and I assume they could be incorrect.

MR. GARRE: That's fine, Your Honor. I want to be clear, though, what the declaration states.

THE COURT: What is the Taliban? What is the Taliban?

MR. GARRE: As the -- the Taliban, they are, as the declaration states in paragraph six, "Al-Qaida and Taliban were and are hostile forces engaged in armed conflict with the armed forces of the United States and its Coalition partners. Accordingly, individuals associated with al-Qaida or Taliban --"

THE COURT: Stop at that point right now. So that's your definition of the Taliban; is that correct?

MR. GARRE: That's what the Mobbs' Declaration

states.

THE COURT: That's what this Mobbs' Declaration states?

MR. GARRE: Yes. If I could also --

THE COURT: Anybody who was in conflict with your Coalition partners is a hostile force?

MR. GARRE: Well, I think that that would be a reasonable supposition, but that's not what the declaration says. The declaration goes on to say individuals associated with al-Qaida or Taliban were and are enemy combatants based on his interviews --

THE COURT: Do you have any information in here that says -- there is nothing in here that says Mr. Hamdi was an al-Qaida.

MR. GARRE: No. No, there isn't.

THE COURT: Why is it in here then?

MR. GARRE: Excuse me, Your Honor?

THE COURT: Why is that in this Mobbs' Declaration? If there is no evidence of any kind that Hamdi was an al-Qaida, why have you mentioned that members of those forces should be considered if he's considered in the same element?

MR. GARRE: Because the hostilities in Afghanistan have focused on the al-Qaida and Taliban forces and individuals over there. That's --

THE COURT: Oh. That's why it's there, not to

connect Mr. Hamdi, but it's to show --

MR. GARRE: I have never understood the petitioners in this case to dispute that the al-Qaida or the Taliban were enemies of the nation.

THE COURT: The problem with the Taliban is that these are all warlords, are they not?

MR. GARRE: I don't know that that's factually correct, Your Honor, but it would -- that statement would conflict with at least the governmental authority that the Taliban --

THE COURT: So that all of these articles about various warlords in Afghanistan having certain units --

MR. GARRE: I think, Your Honor, you're getting to the unconventional nature of the conflict. I appreciate Your Honor's questions. There is no question that we're dealing with a foe which is unconventional, which doesn't follow the laws of the customs of war, which doesn't wear uniforms, and for those reasons, among others, aren't put into the category of traditional POWs. But the Fourth Circuit made clear --

THE COURT: I understand they're not put in the category of traditional POWs. Answer my question then. I realize that the Fourth Circuit has made some rules and regulations, and I shall follow those to the tee. Now, Mr. Garre, don't misunderstand me.

MR. GARRE: Thank you, Your Honor.

THE COURT: You have no fear.

MR. GARRE: But I did want to -- if Your Honor had a question, I did want to state that the Fourth Circuit made clear the unconventional aspects of this conflict don't make mistakes any less grave. And it's clear from the decision, I think, that the unconventional nature of this conflict didn't in any way suggest to the Court of Appeals the military's long established authority to capture and detain enemy combatants was any different in this case than a German soldier captured in the Battle of the Bulge or any other armed conflict with which this court is familiar.

THE COURT: All right. I tend to agree with that in combatants. Combatants should be treated as any person would be. In fact, there are some Army regulations pertaining to it which will have the force and effect of law; isn't that correct? Isn't that correct?

MR. GARRE: I think that there certainly are regulations that have the effect of some law. The regulations, the petitioners certainly haven't based any claims on, and the regulations --

THE COURT: I didn't ask you what the petitioners based any claims on. I'm asking you now about regulations made pursuant to the authority of the Army and Navy and joint regulations. Do they have the force and effect of law?

MR. GARRE: They certainly have some force as law.

There certainly would have to be legal debate about their effect and, more importantly, their application to this case.

THE COURT: We know, therefore, when any person who's taken into custody by the United States, that one gets his complete name, his rank, his serial number, his date of birth, his city of birth, his county of birth, his -- the name and address of next of kin, the date of capture, the place of capture, the capturing unit, the circumstances of capture, and certain other information. But all of that you have; isn't that correct, sir?

MR. GARRE: Well, I think to answer both the Court's questions, first of all, the regulations in this case -- if the Court is referring to the regulations appended to the petitioners' traverse --

THE COURT: I'm talking any persons of war, retained personnel, civilian attorneys, and other detainees under -- it's Army regulation 190-8, a joint regulation applying to all of the -- it's the Navy regulation OPNAVIONST 3461.6, Air Force AFCI 31-304, and Marine Corps MCO 3461.1.

MR. GARRE: Yes, Your Honor. If I could make a couple points addressed to those regulations.

THE COURT: All I'm asking is that regulation is followed, isn't it?

MR. GARRE: Your Honor, I'd like to explain. I'd like to give you the answer.

THE COURT: It isn't followed?

MR. GARRE: No, Your Honor. That's not correct.

THE COURT: So it was followed?

MR. GARRE: The regulations -- if I could try to explain.

THE COURT: I will allow you to explain.

MR. GARRE: Thank you.

THE COURT: Mr. Garre, one of the things that you'll find out about me is you answer my questions, I'll allow you to explain for three hours if it's necessary, okay?

MR. GARRE: Okay.

THE COURT: But answer my questions.

MR. GARRE: Yes, Your Honor.

THE COURT: I realize that in this era of the last decade we want to make explanations, but I want answers and then explanations, okay?

MR. GARRE: Yes, Your Honor.

THE COURT: Let's go.

Then does this regulation require every person when they take a person into custody and he's supposedly in a combat situation --

MR. GARRE: That's not my understanding of the regulations. I haven't on that aspect of it --

THE COURT: Let me focus on another regulation then. This regulation says persons in the custody of the United

States Armed Forces who have not been classified as an EPW, GPW, RP, CI, shall be treated as EPWs until a legal status is ascertained by competent authority. Isn't that correct?

MR. GARRE: It is correct, Your Honor.

THE COURT: And under this regulation the competent authority would be a military tribunal if the matter is in issue; isn't that correct?

MR. GARRE: I don't think that's correct, Your Honor. I think that the competent authority would include the President of the United States, the Commander-in-Chief, and I think --

THE COURT: How about Mr. Mobbs? Is he a competent authority?

MR. GARRE: I mean, I don't think that that question arises --

THE COURT: As you offered it -- looking at this declaration, it says Mobbs did this, Mobbs decided that.

MR. GARRE: Your Honor, I apologize. I am trying to answer your question, but sometimes it requires additional information. And if I could explain the application of these regulations.

THE COURT: We're dealing with the Mobbs' Declaration in relation to law.

MR. GARRE: Your Honor --

THE COURT: That's all I can deal with.

MR. GARRE: Your Honor's asked for the government's explanation as to the application of regulations and if I could explain.

THE COURT: That's all right. Go ahead. You can explain. The regulations don't apply to the United States Navy?

MR. GARRE: Your Honor, the regulations state that persons can be provided with certain protections until their legal status is confirmed. In this case the President has determined that --

THE COURT: That does not appear that the President has determined anything. It appears that Mr. Mobbs has. I'm looking at the Mobbs' Declaration.

MR. GARRE: But, Your Honor --

THE COURT: That's all I'm considering.

MR. GARRE: Your Honor, the President has determined that members of the Taliban and the al-Qaida do not meet the definitions of POWs and, therefore, fall into the status of unlawful combatants. The Mobbs' Declaration explains --

THE COURT: Stop a minute. Do you mean to tell me that all of the people that are serving in the new Afghanistan government that were Taliban or were unlawful enemy combatants of the United States and we put them in office? Is that what you're saying?

MR. GARRE: It's not what I'm saying, Your Honor, for

this reason --

THE COURT: Well, we better -- what I'm having -- the problem I'm having, Mr. Garre, is we can't have our cake and eat it too. Either it applies or it doesn't apply.

MR. GARRE: It does not apply, Your Honor. I've tried to give the Court the reasons why it doesn't apply. It's also a quad services regulation, which is not itself binding on the Department of Defense. And it's, of course, not the basis of any claim based on petitioners. The regulations purport to apply to prisoners of war, people whose status hasn't been determined otherwise. The President has made that determination that members of the al-Qaida and Taliban are not entitled to prisoner of war status. Judge Ellis discussed that determination in his recent decision. We think the Mobbs' Declaration --

THE COURT: I read Judge Ellis' decision. In that case it was interesting. One of the factors that he utilized was the fact that -- I'm sure you're familiar with it -- that Mr. Lindh did not properly attack the problem; isn't that correct?

MR. GARRE: I'm not sure if I understand what the Court's referring to.

THE COURT: Well, let's see if I can find that opinion. In his opinion he had several factors that he applied. One of them was the ability of Lindh to contest the

matter; isn't that correct?

MR. GARRE: Well, of course, Mr. Lindh was charged with a criminal offenses which invoked constitutional rights that do not apply in this proceeding.

THE COURT: So if Hamdi were charged with a criminal offense which would cause him to be, let's say, jailed for six months or more, he would be entitled to counsel; isn't that correct?

MR. GARRE: He would be entitled to the same protections that Mr. Lindh received, and that would include counsel, yes. We don't dispute that, the application of the Sixth Amendment in this case, but we've argued in our return that the Sixth Amendment has no application by its terms or by precedent to this type of proceeding.

Now, Mr. Lindh was involved in a criminal proceeding. He pleaded guilty to aiding the Taliban and to using a weapon with the Taliban, and admitted in open court to be a Taliban soldier. That's resulted in his imprisonment for 20 years. Mr. Hamdi is being detained as an enemy combatant in connection with the current hostilities. He hasn't been charged with any criminal offense or other offense. And his detention is necessary, as we've explained, because of the purposes that combatants have always been detained: One, to prevent them from going out continuing to give aid or fight with the enemy; and two, because of the important role that intelligence

gathering has in any war effort. The government -- precisely because of the unconventional --

THE COURT: How long does it take to question a man: A year? Two years?

MR. GARRE: Your Honor, Chief Judge --

THE COURT: 10 years? A lifetime? How long?

MR. GARRE: Your Honor, Chief Judge Wilkinson put it this way at the last oral argument, and I think it's an excellent analogy: Intelligence gathering is like building a puzzle. You have to put the puzzles together. And oftentimes you don't realize with any given piece how it fits in together until there are subsequent developments or subsequent information comes to light.

We know it takes time. It takes time in the current war effort in particular because of the unconventional nature --

THE COURT: How much time, Mr. Garre? I agree with Judge Wilkinson, of course. How much time?

MR. GARRE: I can't answer that question today, and I don't think one would be able to answer that question --

THE COURT: Would you say 10 years or 20?

MR. GARRE: Your Honor, we would not be in anymore position to answer that today than we would be after 11 months after the attacks on Pearl Harbor with respect to how long a war would last, how long we need to gather intelligence. It's

not a novel situation for the government to be in to not be able to answer those questions.

THE COURT: As long as you're gathering intelligence you can keep this man in a locked cell with no windows -- he's already been there four months, five months? He can't even have a piece of paper and a pencil to write on?

MR. GARRE: Well --

THE COURT: Isn't that what you said in -- before Judge -- in the Court, according to the newspaper article?

MR. GARRE: I'm not familiar with those statements, Your Honor. They would be incorrect. I don't believe we made those -- that position.

THE COURT: Well, maybe --

MR. GARRE: Petitioners have made clear, and this is on page nine of their traverse, I think, that they're not challenging the conditions of Mr. Hamdi's confinement. I think what -- the way the Fourth Circuit characterized it, and I think it's the helpful and the correct way to do it, and that's a question of the Court whether or not Mr. Hamdi's detention --

THE COURT: Don't you think this is of some concern that a person is being held in solitary confinement in a windowless room --

MR. GARRE: Your Honor --

THE COURT: -- for four months? Is that -- incommunicado?

MR. GARRE: I don't know where the character.letter to the windowless room comes --

THE COURT: It came from a newspaper article, Mr. McCray or somebody familiar with the case.

MR. GARRE: We stated in our return that Mr. Hamdi is not in solitary confinement in the traditional sense that term is used. He happens to be the only captured enemy combatant who's currently detained at the Norfolk facility. By other laws and regulations he is separated from military personnel who are detained there. Mr. Hamdi does receive daily visits from the commander of the brig. He is able to meet with the chaplain at the brig three or four times a week. He meets with the doctor once a week. So the notion --

THE COURT: He just can't meet with a lawyer?

MR. GARRE: Well, Your Honor, again, I think that Chief Judge Wilkinson put it aptly when he mentioned during the last argument that no one would suggest that the German soldier captured at the Battle of the Bulge would be able to come back and be entitled to a right to counsel, much less --

THE COURT: I don't have any question about that, but we're not dealing with a German soldier captured at the Battle of the Bulge. We're dealing with an individual who evidently, according to your statement, was picked up in a situation in which, in reading this, he had a weapon and he was with a Taliban unit; isn't that correct?

MR. GARRE: He surrendered with a Taliban unit. It also says he went to Afghanistan --

THE COURT: What's interesting here is it says -- let's look at this paragraph. It says Northern Alliance forces were engaged in battle with the Taliban.

I have no doubts Northern Alliance forces engaged in a battle with the Taliban. It doesn't say in a battle with the Taliban unit that this man was in. It says engaged in a battle with the Taliban. That's true. The whole world knows that. Mobbs doesn't have to say that. But what he didn't say was they were engaged in a battle with this unit.

MR. GARRE: Your Honor, I think if the Court's concern is to whether or not someone who --

THE COURT: My concern is what is stated in this declaration. You have quite rightly, according to the Fourth Circuit, not given me anything evidently. And --

MR. GARRE: With respect, that's not true, Your Honor. The Mobbs' Declaration explains in detail --

THE COURT: The only thing is the Mobbs' Declaration, and, accordingly, I'm going down it piece by piece.

You know, one of the things in early life I was taught, when you're reading a letter, like a letter of reference, one reads for what is there and what is not there. It is important to determine what is left out as well as what is put in.

What is put in is Northern Alliance forces were engaged in battle with the Taliban. We know that. Hamdi's unit surrendered to Northern Alliance forces, not to any U. S. forces. He was transported with his unit from Kondur, Afghanistan to the prison in Mazar-e-Sharif, Afghanistan which was under the control of Northern Alliance forces.

It was -- the next sentence is extremely interesting. Hamdi was directed to surrender his -- I can't pronounce it -- assault rifle to Northern Alliance forces en route to Mazar-e-Sharif and did so.

In other words, he had his weapon after he turned himself over to Northern Alliance forces, and kept it until later. Doesn't sound much like anybody was afraid of him, does it?

MR. GARRE: Your Honor, I would disagree with that. I think if Your Honor looks at other paragraphs of the declaration, I think it is important to read it as a whole.

THE COURT: The next sentence --

MR. GARRE: The battlefield interrogation team determined that Mr. Hamdi went to train with and, if necessary, fight with the Taliban.

THE COURT: Wait a minute.

MR. GARRE: That's in paragraph five.

THE COURT: Wait a minute. Can you go down to the next paragraph?

MR. GARRE: It's the next paragraph, Your Honor, that Your Honor was reading from.

THE COURT: He identified himself as a Saudi citizen, okay?

MR. GARRE: Yes, Your Honor.

THE COURT: If he identified himself as a Saudi citizen, why was he separated from the remainder of his compatriots, whomever they may be, in Guantanamo?

MR. GARRE: He was separated first in Afghanistan because the battlefield interrogation team made the determination that he was an enemy combatant.

THE COURT: Doesn't say anything about that. Somebody made a determination.

MR. GARRE: I think it does, Your Honor. I think it says, in paragraph five, Hamdi was interviewed by a U. S. interrogation team while he was in prison in Sheberghan.

THE COURT: U. S. interrogation team?

MR. GARRE: Yes, Your Honor. A team consisting of military personnel on the ground.

THE COURT: It doesn't say that. It says a U. S. interrogation team.

MR. GARRE: Yes, Your Honor. That's what it says.

THE COURT: I assume 10 U. S. citizens could be an interrogation team, or two. It doesn't say it's any type of interrogation team. It just says a U. S. interrogation team.

MR. GARRE: It's the military forces in Afghanistan comprise that team, and that team made a determination.

THE COURT: Where does it say that in there? Does it say it in there?

MR. GARRE: Your Honor, let me then refer the Court to paragraph eight if it has concerns about whether or not that was a military unit that made that determination.

In January 2002 a detainee review and screening team established by the commander of U. S. Central Command reviewed Hamdi's record and determined that he met the criteria established by the Secretary of Defense for individuals over whom the United States forces should take control and moved to Guantanamo Bay, Cuba. The detention --

THE COURT: So he was supposed to be moved to Guantanamo Bay. He met the criteria for going to Guantanamo Bay. I don't know what that was, but I assume he met that criteria.

MR. GARRE: That's correct, Your Honor. The declaration also makes clear that the military has determined, based on interviews with Mr. Hamdi, and in light of his association with the Taliban, that Hamdi was considered by military forces to be an enemy combatant. That's --

THE COURT. Wait a minute. Where does it say that?

MR. GARRE: It says that in paragraph six, Your Honor, the last sentence of paragraph six.

THE COURT: Hamdi was considered by military forces to be an enemy combatant.

MR. GARRE: That's right. That ties right into paragraph five which refers to the U. S. interrogation team which was the military force, Your Honor.

THE COURT: It doesn't say that. It says some military force determined --

MR. GARRE: The declaration states military forces made that determination. Significantly, petitioners don't --

THE COURT: Was that the Northern Alliance military forces?

MR. GARRE: No, Your Honor. I think --

THE COURT: How would I know it wasn't?

MR. GARRE: The Northern Alliance forces --

THE COURT: It doesn't say in here it was the American military forces. It says military forces.

MR. GARRE: Your Honor --

THE COURT: Is the Northern Alliance a military force?

MR. GARRE: Your Honor, with respect --

THE COURT: You see, you won't give me any information except that information that's in this Mobbs' Declaration. You may be entirely correct, Mr. Garre. You may be absolutely correct. He may be the worst enemy any man ever had. But the problem is what you're saying is I must rely on

this and only this. If I'm to rely on only this, then I must pick it apart. Do you understand that, Mr. Garre?

MR. GARRE: I do understand that, Your Honor, and I think --

THE COURT: If you gave me the information, you know, then all of this probably could have been avoided.

MR. GARRE: Well --

THE COURT: It just doesn't make sense.

MR. GARRE: With respect, Your Honor, we think that the standard that governs the proceeding at this stage is that the military would be asked to come forward and to provide a factual basis for its determination that Mr. Hamdi is an enemy combatant. That standard has been applied in other habeas contexts which involve the review of executive determinations which are entitled to even less deference.

THE COURT: In this regulation that may or may not apply because it applies to almost all of the -- it says this: A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or is engaged in hostile activities in aid of enemy armed forces and who asserts that he or she is entitled to treatment as a prisoner of war or concerning whom any doubt of a like nature exists.

And I'm speaking of --

MR. GARRE: 1.6(b), Your Honor.

THE COURT: That's correct.

MR. GARRE: That's right. That provision doesn't apply because it's directed to individuals who are being held as and are entitled to status of POWs. It refers to Article IV of the Geneva Convention, which is --

THE COURT: You mean he's not contesting, then, I assume, that he's not an illegal enemy combatant? He's not contesting that?

MR. GARRE: I think --

THE COURT: And his statements would indicate to you that he's not contesting that? I don't have the benefit of his statements because you don't want to provide those obviously. And you don't have to. I'm not saying you do.

MR. GARRE: Mr. Hamdi is being held like the other detainees captured in connection with the hostilities in Afghanistan, not as a POW. The President has determined, and Judge Ellis explained this in his recent decision in the Lindh case --

THE COURT: If Judge Ellis were here, then he already would have decided the case. So I have anything to decide or do you want to say Judge Ellis has decided that Hamdi should be held? Why am I here? If that's the case, you know, we may not have any of these proceedings, need we?

MR. GARRE: With respect, Your Honor, we have made clear that the courts have a role in habeas proceedings of this

type. Now, part of those proceedings are going to involve the review of legal challenges. And those are the principal challenges raised by the habeas petition in this case. And if Your Honor would like, I would be happy to discuss those challenges.

Now, another part of that role is the role that the Fourth Circuit discussed in its recent decision. And that's a much more limited role involving a review of the executive's determination that an individual is an enemy combatant.

Now, the Court's limited role in that sphere follows from the separation of powers principle governing this determination and respect for the fact that the military, the Fourth Circuit has said, and the executive branch is in the best position to make these determinations, and that the Court, therefore, has a much more limited role. It doesn't mean it has no role. The Fourth Circuit suggested --

THE COURT: The interpretation, assuming that the President has made a determination, and I haven't seen that, but I assume that that will be provided at some point in time --

MR. GARRE: Well, Your Honor, with respect --

THE COURT: Don't misunderstand me. I haven't been provided that.

MR. GARRE: The relevant material set out in Judge Ellis' decision, which --

THE COURT: He said the interpretation of the President was due deference, that Lindh failed to carry his burden of demonstrating to the contrary. So Lindh had a right to demonstrate to the contrary, did he not?

MR. GARRE: In the criminal proceeding, which is not applicable here.

THE COURT: Lindh had a right to demonstrate he was not an illegal enemy combatant, did he not?

MR. GARRE: Yes, he did, Your Honor. And Lindh was entitled to other rights that are afforded --

THE COURT: And he failed to do that? Did he fail to do it?

MR. GARRE: Yes, Your Honor.

The reference to the President's decision is contained in the February press release. I would be happy to provide the Court that, if it would like. Petitioners haven't relied on that.

THE COURT: What you're saying is I can look at press releases then?

MR. GARRE: I said I would be happy to provide it.

THE COURT: Should I look at press releases?

MR. GARRE: This issue --

THE COURT: All I want to know -- I don't want to look at press releases for one side and not look at press releases for the other.

MR. GARRE: Let me try to be clear on this. We think the Court can resolve this case on the papers that are before it and that it can and should grant the government's motion to dismiss.

THE COURT: What's worrying me is the Mobbs' Declaration. I don't know who Mobbs is or was or is he a hired expert or was he hired for the purpose of making this affidavit. He may have been a person that investigated it thoroughly. He may be the most knowledgeable person. He may be a historian and know all about the history of the East and Near East. He may know about all the warlords that have been going back and forth there for centuries.

MR. GARRE: With respect, Your Honor, the Court's role here is not to conduct a Daubert type inquiry under 702.

THE COURT: I'm not going to go into a Daubert inquiry. I want to go back to this --

MR. GARRE: The question for the Court is whether or not the Mobbs' Declaration provides a factual basis for the military's determination. It does so. It explains in detail Mr. Hamdi is a classic type of enemy combatant who was captured on a foreign battlefield, surrendered, and laid down his gun, his AK-47, with an enemy unit. We think that -- there hasn't been a real dispute over whether or not someone who surrenders with an enemy unit --

THE COURT: Dispute with what? What is Hamdi

disputing? Only thing he disputes is some lawyer that is stuck by the problem of not being able to talk to him, not see any statements he made, not see anything from him, but only to look at the Mobbs' Declaration and to attack it. Isn't that all that they can do?

MR. GARRE: That's correct, and that's consistent with the Fourth Circuit's recent decision --

THE COURT: That's consistent with the Court of Appeals. I understand that.

MR. GARRE: -- and the long established authority it relied on. But it's still relevant, Your Honor, that the petitioners -- that the Court still has to look at the claims made by the petitioners in this case.

THE COURT: But, you know -- let's go back to paragraph three. As I said, Hamdi was affiliated with a Taliban military unit. It doesn't say Hamdi was a member of a Taliban military unit, does it?

MR. GARRE: It says affiliated, Your Honor. And it also says, again in paragraph five, that the interrogation team confirmed that Hamdi went to train with and, if necessary, fight for the Taliban. Persons who train with enemy units --

THE COURT: That's not in paragraph three. That's in the other paragraph.

MR. GARRE: That's true, Your Honor.

THE COURT: I'm trying to go down them number by

number. I realize it does make it a little hard for you, Mr. Garre, because I appreciate what you're doing.

Now, number --

MR. GARRE: Thank you, Your Honor.

THE COURT: In -- it does not say what military unit he was with, does it? It doesn't say what unit. It just says it was a unit.

MR. GARRE: That's right, Your Honor.

THE COURT: Okay. So in paragraph 4 Mobbs states that Hamdi was captured by Northern Alliance forces in late 2001. Now, if he investigated the record, he would know exactly when he was captured, wouldn't he, because we know from the regulation that somebody determined the date of capture, place of capture, and so forth, correct?

MR. GARRE: Your Honor, I don't know whether or not that fact is correct, and I don't think the regulation referred to is applicable to Mr. Hamdi, but, to be clear, the military has --

THE COURT: Let me say this so we understand one another from the beginning:

MR. GARRE: Yes.

THE COURT: I think the regulation pertains to the United States Armed Services, okay? As such, when the United States Armed Services got Hamdi, they had to follow the regulation. I'm not holding anything else, but that's just no

ifs, ands, or buts, okay?

MR. GARRE: I understand the Court's position on that. I think that's incorrect.

THE COURT: That's not the issue before me.

MR. GARRE: But if I could be clear, the military has -- and this was referred to in the Mobbs' Declaration reports and records. It has more information on Mr. Hamdi's capture, but it's in the military. Mr. Mobbs has reviewed the relevant information with respect to Mr. Hamdi, laid out the grounds and circumstances under which he was captured and detained and determined to be an enemy combatant. It's not for the Court to conduct a de novo proceeding.

THE COURT: I'm not trying to conduct a de novo proceeding. All I want is the papers. If I had seen the papers, we probably would have ended this a long time ago. Now I'm curious. I get more curious all the time.

MR. GARRE: But -- and --

THE COURT: And, you see -- you know, generally, generally -- not to say that the government would -- generally when people hide things you can generally assume if it were advantageous to them they wouldn't hide it, would they? Is that a fair assumption?

MR. GARRE: Your Honor, that may be a fair assumption in some circumstances, but, to be clear, that wouldn't apply here. The military has provided the basis on which it's

determined that Mr. Hamdi is an enemy combatant. Under the limited standard review that would govern here the military has come forward and provided a factual basis which would satisfy the Fourth Circuit's decision in this case and which would make clear that the present detention of Mr. Hamdi is lawful. It's not --

THE COURT: What concerned me, this statement indicates that Hamdi kept his weapon after he surrendered, for some time after. And what bothers me is that what is traded between these two sides, the Northern Alliance or group, obviously, of people that -- well, I don't want to even go into it. In any event, I don't know what distinguishes a Northern Alliance unit from a Taliban unit. There is nothing to say what distinguishes the two.

MR. GARRE: Well, Your Honor --

THE COURT: I dare say it would be hard for us to figure it out, wouldn't it, Mr. Garre?

MR. GARRE: With respect, I would disagree. As the declaration states, the Northern Alliance forces were engaged in battle with the Taliban. And that -- the Court doesn't need --

THE COURT: Doesn't say they were engaged with the Taliban that Mr. Hamdi was with. That's what's so interesting about this.

MR. GARRE: Your Honor, I think what's interesting

about this is that Mr. Hamdi associated with a Taliban unit, an enemy unit, an enemy of the United States. He surrendered his AK-47 rifle when he was captured by Northern Alliance forces, which we've explained in our papers were Coalition forces. The United States interrogation team on the battlefield -- petitioners don't challenge -- they make this very clear. Petitioners are not challenging the battlefield determination.

THE COURT: Who is not challenging?

MR. GARRE: Petitioners. The individuals here today. It's in their papers, the traverse which is before this court.

THE COURT: As far as I'm concerned, I'm only looking at the Mobbs' Declaration. I'm challenging everything in the Mobbs' Declaration. So understand that, Mr. Garre.

MR. GARRE: I appreciate that.

THE COURT: I don't know what Mr. Dunham does or doesn't do.

MR. GARRE: I appreciate that.

THE COURT: I'm going down this thing piece by piece. And if you think that I don't understand the utilization of words, you're sadly mistaken. I understand what the words mean and what they don't mean. And I think Mr. Mobbs understands the utilization of words. He is a "special advisor" as far as I can tell. I don't even know what GS rank he may have or doesn't have or whether he's just a consultant.

MR. GARRE: Your Honor, I don't know that either, but

what I do know is he has been substantially involved with the detainee operations that the United States military has been involved in with respect to the al-Qaida and the Taliban. That's in paragraph one of the declaration. I can read it to the Court.

THE COURT: You can read it. Go ahead.

MR. GARRE: In this position, I have been substantially involved with matters related to the detention of enemy combatants in the current war against the al-Qaida terrorists and those who support and harbor them, including the Taliban. I have been involved with the detainee operations since mid-February 2002 and currently head the Under Secretary of Defense for Policy's Detainee Policy Group.

I think that clearly puts Mr. Mobbs in the position of someone who would be familiar with the overarching --

THE COURT: My secretary is familiar with the Hamdi case. Should she decide it?

MR. GARRE: I think what the Fourth Circuit --

THE COURT: She's a special advisor. In fact, the secretaries have gotten new titles now.

MR. GARRE: With respect, Your Honor, the question was made -- I think it was made not seriously, but --

THE COURT: I'm only reducing things to an absurdity for the purpose of emphasizing certain attributes of the Mobbs' Declaration.

MR. GARRE: We don't think that there is anything absurd about the Mobbs' Declaration or anything absurd about the government's position in this case.

THE COURT: I didn't say it was. I merely said I reduce things to an absurdity to emphasize those things that are wrong. I'm not trying to say it's absurd. And I want to make that clear. And, Mr. Garre, you know I wasn't. So be --

MR. GARRE: No, Your Honor. I appreciate that the Court was not being serious in that, but it does illustrate an important point, which is that the military is in the best position to make these judgments.

THE COURT: I didn't say the military wasn't in the best position. All I'm saying is it doesn't show in this Mobbs' Declaration that a military tribunal has acted, that a convening authority, as required by the regulation, convened a special military panel of which one of which would be composed of a member of the Judge Advocate General Corps, whether it be in the Navy, the Army, or the Marine Corps.

MR. GARRE: Your Honor --

THE COURT: They would then make a decision if it was in doubt. What you're saying is it's not in doubt, there is no question about it, except I don't know of any battle this man engaged in, I don't know of any weapon he ever fired, I don't know of anything he did, other than to be present with a Taliban unit according to them. And I assume that's correct.

But if I begin to have doubts about this, then why wouldn't the military tribunal have acted in the eight or nine months since he's been captured?

MR. GARRE: Your Honor, I've tried to explain the government's position, that those regulations the Court referred to are not applicable in this case. I understand that the Court disagrees with the government on that, but I think the Court's characterization --

THE COURT: I feel that the regulations apply. I'm not saying they don't apply. That doesn't affect his status any. It may be that they would decide he's an unlawful enemy combatant.

MR. GARRE: It doesn't affect his status. It in no way affects the determinations --

THE COURT: What worries me is nobody, nobody, seems to care what Hamdi says.

MR. GARRE: Oh, to the contrary, Your Honor. And I think, again, the Mobbs' Declaration --

THE COURT: You've picked out statements that said -- and I looked at that statement. You know, a long time ago, as I told you, they said that he stated that he entered Afghanistan to train with and, if necessary, fight for the Taliban, correct?

MR. GARRE: That's what it states, Your Honor, yes.

THE COURT: If necessary. If necessary might mean in

self-defense. It might mean a myriad of a number of things. I don't know what he said, in what context it was said.

MR. GARRE: Your Honor, I think that that's not relevant to argue the case. The view we've set out in our motion to dismiss, and so that I can try to be more clear with the Court, our position -- the military has determined that someone who goes to Afghanistan to train with an enemy unit, someone who stayed in Afghanistan after September 11th and the attacks on this nation, someone who surrendered in Afghanistan to Northern Alliance forces and surrendered his AK-47 to those forces, is an enemy combatant if the military makes that determination, and that the Mobbs' Declaration provides the Court with the substantial factual basis --

THE COURT: The military does not have to make that regulation in accordance with their regulations; is that correct?

MR. GARRE: Your Honor, I explained why we think that regulation does not apply here.

THE COURT: Well, maybe you better explain it again because I want to make sure I understand what the government's position is on the inapplicability of the regulation.

MR. GARRE: Well, first, as I said, just as a technical matter it's a quad services regulation that isn't specifically binding on the Department of Defense, and second and more --

THE COURT: Wait a minute. Do I understand that the Department of Defense is holding him prisoner and not the military? He isn't in the Navy brig?

MR. GARRE: Well --

THE COURT: What's this commander doing here, the poor fellow who you say is visiting him every day? What is he doing here as a defendant? You want only Rumsfeld as the defendant?

MR. GARRE: Rumsfeld and the commander of the brig, that's right, Your Honor. And the second --

THE COURT: I'm not sure Rumsfeld was a necessary party, but if you feel he's a necessary party --

MR. GARRE: Excuse me, Your Honor?

THE COURT: Do you feel Rumsfeld is a necessary party?

MR. GARRE: Certainly in the typical habeas cases Your Honor is well familiar, the custodian, immediate custodian -- that's right. Perhaps we should have moved for the dismissal of Mr. Rumsfeld. We, frankly, were focused on other jurisdictional issues at the outset of this investigation.

THE COURT: Looks like Rumsfeld made a decision. I dare say he doesn't know anymore about this case than he's read in the newspaper, do you?

MR. GARRE: With respect, Your Honor, I don't know

how to answer that question.

THE COURT: He may know more about it now.

MR. GARRE: The regulation -- if I could try to answer the Court's question on the regulations, the regulations apply -- this is in 15 General Protection Policy, U. S. policy relative to the treatment of EPW, CL, and RP, in the custody of U. S. Armed Forces is as follows: Now, the EPW doesn't refer to people like Mr. Hamdi. EPW refers to prisoner of war. The CI --

THE COURT: You know what's interesting to me, because you're depending upon prisoner of war in accordance with the regulation; is that correct?

MR. GARRE: Well, the regulations are --

THE COURT: You --

MR. GARRE: Yes.

THE COURT: The only prisoners of war are in accordance with the regulation?

MR. GARRE: The regulation is addressed -- it states in the regulation to those that meets the --

THE COURT: Mr. Garre, I have to fight for it. Are you contending that the only prisoners of war are those who are prisoners in accordance with the prisoner of war designation in the regulation?

MR. GARRE: I'm not sure. I want to answer the Court's question, but I'm not sure I understand it. What I am

contending --

THE COURT: Maybe I'll repeat it again.

MR. GARRE: Okay.

THE COURT: Do you contend that the regulation defines prisoners of war and that only those people as such defined in the regulation are prisoners of war?

MR. GARRE: Yes.

THE COURT: All right.

MR. GARRE: In the definition as contained in the regulation.

THE COURT: So everybody else is not a prisoner of war. They're a prisoner of what?

MR. GARRE: They may be another detainee or they may be a combatant. Your Honor, this is spelled out in the regulations. It's consistent with the Geneva Convention.

THE COURT: Let me ask about the customs of war. Forget the regulation. He isn't a prisoner of war under the regulation so far as you're concerned, so let's deal with something else.

Are there any customs of war?

MR. GARRE: Well, is Your Honor referring to the Geneva Convention?

THE COURT: I'm not worried -- I haven't raised the Geneva Convention. I didn't even say the Geneva Convention applies. As far as I know, Afghanistan didn't sign the Geneva

Convention. If we apply the Geneva Convention, we're in pretty bad shape. Let's go ahead. Because Hamdi is entitled to a lot of things if he were a prisoner of war under the Geneva Convention. I'm only talking to Army regulations -- Navy regulations that pertain to people who may be custodians, okay?

Now, let's go into the customs of war. Customs of war. If you take a prisoner in battle and in the customs of war they were a prisoner of war, is that correct, not under the regulations?

MR. GARRE: I think, Your Honor --

THE COURT: I'm talking about customs of war.

MR. GARRE: The Quirin case resolved that where it talks about --

THE COURT: Who?

MR. GARRE: The Quirin case, the Supreme Court case, 317 U.S. 1.

THE COURT: They weren't -- they were spies. They landed on foreign territory in -- and not in uniforms but in civilian clothes.

MR. GARRE: That's true about the saboteurs.

THE COURT: They talk about combatants. They talk about belligerents.

MR. GARRE: You know, that raises an important point about why the determination has been made that members of the -- or people like Mr. Hamdi, al-Qaida and Taliban

detainees, have not been determined to be prisoners of war under the Geneva Convention or customs of law, because they don't fight with uniforms, they don't follow the laws and customs of war.

THE COURT: Stop. Where does it say he didn't have a uniform in the Mobbs' Declaration?

MR. GARRE: I'm referring --

THE COURT: In the Mobbs' Declaration does it say --

MR. GARRE: It didn't say that, Your Honor.

THE COURT: In the Mobbs' Declaration where did it say he was not a member of an organized unit?

MR. GARRE: It does not say that. He surrendered and went to train to fight with the Taliban unit.

THE COURT: Am I to assume that it was commanded by someone if it's a unit, or can I not assume that? You see, the real problem, Mr. Garre, is when you're deciding something only, only, on a declaration, then, unfortunately, the declaration has to be very thorough.

MR. GARRE: I appreciate Your Honor's effort to --

THE COURT: I can't do a thing other than look at this declaration. And if I look at the declaration, then I find that there are certain omissions that seem substantial.

MR. GARRE: Your Honor, I appreciate your efforts to look at the Mobbs' Declaration. And I do think it's fair to say that any good lawyer, and particularly any good judge,

would be able to go through a declaration and find the sorts of things that Your Honor has pointed to today. What we do think -- and if I could be clear about the government's position -- is that the declaration has to be read as a whole, and the declaration in this case which explains the grounds and circumstances underlying Mr. Hamdi's capture, his surrender, the reasons why he went to Afghanistan, and the military's determination --

THE COURT: I don't have any doubts he had a firearm. I don't have any doubts he went to Afghanistan to be with the Taliban. I don't have any doubts of either of those things, Mr. Garre. If that is sufficient, if that is sufficient, alone, standing alone, to put him in a cell without windows for six months or 10 months or four months or whatever it is, then so be it. I have some real doubts about that.

Let me hear from Mr. Dunham.

MR. GARRE: Thank you, Your Honor.

THE COURT: Because that's really where we are.

Mr. Dunham.

MR. DUNHAM: Excuse me one second, Your Honor.

Your Honor, we have problems with the Mobbs' Declaration as being the be all and the end all of how this case should be decided. In fact, we believe that the writ of habeas corpus, you might as well just toss it out the window if somebody like Mr. Mobbs --

THE COURT: I can't decide that, Mr. Dunham. The Court of Appeals has already ruled that the only thing I can consider before proceeding any further is whether the Mobbs' Declaration is sufficient. If the Mobbs' Declaration is sufficient, Mr. Dunham, then there is no writ of habeas corpus in this case.

MR. DUNHAM: That's correct, Your Honor.

THE COURT: That's what the Court of Appeals has held.

MR. DUNHAM: That's right. But what the Court of Appeals also held was that Mr. Hamdi was entitled to meaningful judicial review. They clearly said that in the opinion. And I do not believe that you can give meaningful judicial review on the basis of the Mobbs' Declaration alone because it raises more questions than it answers.

The Mobbs' Declaration, for example, it does not say that Mr. Hamdi was an unlawful combatant. I mean, we keep getting explanations for why the regulations don't apply to Mr. Hamdi. The reason why the quad military regulations that Your Honor has been talking about, they don't apply, Mr. Garre says, because Mr. Hamdi is an unlawful combatant.

Now, to me, that's a glaring omission from the Mobbs' Declaration. It doesn't say anything about unlawful. It says he was an enemy combatant. Now, that's not why -- that doesn't square with the conditions under which he's being held. He's

being held in a military brig in Norfolk. He's being held in solitary confinement. He's being punished. He's not being held like an enemy soldier. Back in 1890 the --

THE COURT: At least he can bring a 1983 action against the person, I assume, or at least a constitutional action for lack of due process, but we're not concerned with the lack of due process here. We're concerned with the Mobbs' Declaration.

MR. DUNHAM: I think we are concerned with whether or not Mr. Hamdi is truly being held as an enemy combatant, because I think he's being held as something else. I think that the Court can infer from the fact that the government's not following its clearly printed regulations with how you should treat somebody like Mr. Hamdi as the fact that that's not why they're holding him.

Now, we look at the -- we look -- because the question is whether the Mobbs' Declaration is adequate to determine why Mr. Hamdi is being held.

THE COURT: Assuming the Mobbs' Declaration is inadequate, shouldn't the government be given an opportunity to have a convening authority convene the appropriate military tribunal?

MR. DUNHAM: Well, I will -- first off, I believe the regulations -- yes. I believe the appropriate tribunal, yes. Whether the word military goes in front of it or not I might

question.

THE COURT: The regulation says, doesn't it, that a convening authority, that is a general court-martial convening authority, which would indicate a flag officer in the Navy, would have to convene such a tribunal?

MR. DUNHAM: The President has determined in this particular situation that you don't use military tribunals for U. S. citizens. That's why they charged John Walker Lindh with a --

THE COURT: So he is not entitled, but that doesn't make any difference what the President has said if the regulation requires it, Mr. Dunham.

MR. DUNHAM: The regulation requires that the man be treated as a prisoner of war unless a military tribunal determines otherwise.

THE COURT: That's correct.

MR. DUNHAM: That regulation is not just some military regulation that doesn't bind the Department of Defense. That is our government's attempt to comply with the requirements of the Geneva Convention which requires precisely that before you treat somebody as an unlawful combatant you must have some type of process, such as -- by an appropriate authority, such as a military tribunal, to treat somebody as an unlawful combatant.

Now, you can't separate that out from the fact that

Mr. Mobbs' Declaration -- Mr. Mobbs tries to tell the Court that we are still engaged in hostility with the Taliban.

THE COURT: Well, the question there is the President has declared the national emergency with the Taliban over; is that correct?

MR. DUNHAM: That's correct.

THE COURT: Now we understand that. But the question, really, is that there was a reservation in that declaration, too, was there not?

MR. DUNHAM: That's correct, with regard to al-Qaida. It's not a declaration with regard to -- they haven't established in the Mobbs' Declaration that Mr. Hamdi falls into that exception.

THE COURT: Well, he's not a member of the al-Qaida. They just throw the words in there because it helps them. It looks good.

MR. DUNHAM: So the point I'm making is that Mr. Hamdi is currently being held as if he were an unlawful combatant without having been given any of the benefits of the regulations for that determination and without any statement in the Mobbs' Declaration that he is an unlawful combatant. If he is merely an enemy combatant and that's all he is, he should be released because the hostilities with the government of Afghanistan have ended. And under all the laws of war when the hostilities end the prisoners are released. That's

international law.

And we believe that if the government wants to stand here and say, Your Honor, we're not going to give you anything but the Mobbs' Declaration --

THE COURT: Well, that's what they said, isn't it?

MR. DUNHAM: -- we will rise or fall on that declaration, well, I say that if they do that we should get our writ granted today and we should walk over to the brig and get Mr. Hamdi because that declaration doesn't justify his detention.

Now, I am -- I do not understand -- this is one of the things I do not understand. They talk about Judge Ellis' decision in the Walker Lindh case. They don't bother to tell this case -- that in the Walker Lindh case Judge Ellis had access to statements by Mr. Hamdi, statements that they have not provided to this court. Judge Ellis determined that those statements were exculpatory to Mr. Lindh on the enemy combatant theory, whether or not Lindh was an enemy combatant, and he released those statements to Walker Lindh's private attorneys. But for some reason this court can't have them. They're not even classified. I can't figure out -- I mean, I can understand an argument -- I can understand it. I don't agree with it.

THE COURT: That's unclassified?

MR. DUNHAM: It's unclassified. My declaration is in

the file to that effect.

THE COURT: I saw that. It said it was not classified. How did you find out they were not classified?

MR. DUNHAM: Well, because when they had the hearing as to whether or not they could see Hamdi -- Hamdi must be the most popular guy I know because everybody wants to see him.

THE COURT: Well, that's good he's out there. At least according to at least the newspaper report -- I haven't looked at his cell -- he doesn't have a window in that cell.

MR. DUNHAM: But the --

THE COURT: That's according to the newspaper.

MR. DUNHAM: They wanted to see him. Of course, when they got these exculpatory statements they wanted to go see him because they thought he might be a good witness to call at their trial. Judge Ellis told them, well, you've got to check with Dunham, Dunham is Hamdi's lawyer, he'll get you in to see him. Well, big deal, I can't even see him. But the bottom line is that's what Judge Ellis told them.

THE COURT: They could have seen him because Walker Lindh was charged with something. Now, Hamdi is not charged with anything.

MR. DUNHAM: No, but he was --

THE COURT: Because if he was charged with something, you know, he'd have to be brought before a magistrate, and probable cause would have to be utilized within -- according to

the Supreme Court of the United States, within 48 hours. So we know they can't charge him now with something.

MR. DUNHAM: That's correct.

THE COURT: So it's been -- I would dare say that this length of time -- we know the decisions of the Supreme Court. They even set down a time limit for charging someone after they've taken them into custody.

MR. DUNHAM: Well --

THE COURT: But maybe it doesn't apply to the military. Maybe they could charge him. I would doubt the Supreme Court would let them hold somebody eight months or more without charging someone with something.

MR. DUNHAM: The only point I'm making, Your Honor, is that the government has more information about this situation than they have chosen to provide to the Court or to counsel for Mr. Hamdi, and that, to me, it's a very risky proposition, if they seriously want to hold this man, to come in here with an affidavit or a declaration that's as flawed as this Mobbs' Declaration is, omitting as many facts as it omits.

Just the colloquy between Your Honor and Mr. Garre shows the -- a number of deficiencies in this document, including the very basic factors of the date on which he was captured. I mean, that could be very significant in deciding legal rights. I mean, this says late in 2001. What does late in 2001 mean? Does that mean October 1st, December 31st? Why

do we have to guess as to when he was captured? All of these things as to the regulation are supposed to be taken down, unless maybe he's an unlawful combatant and the regulation doesn't apply to him. Mr. Mobbs doesn't say he's an unlawful combatant. Because Mr. Mobbs doesn't say he's an unlawful combatant and you're limited to the Mobbs' Declaration, you have to assume that he's a lawful combatant. And, yet, we are confronted with a detention in Norfolk, which is another dog that doesn't bark.

THE COURT: If you had to say he was a lawful combatant, it's obvious that they're not complying with the requirements of the Geneva Convention. But the Geneva Convention really doesn't apply to him. They wouldn't be complying with the regulations, which the Geneva Convention requires him to stay with the people of his own --

MR. DUNHAM: The other dog that doesn't bark in the Mobbs' Declaration is it doesn't explain why he's moved to Norfolk. Why is he separated from his unit? Why is he flown to Dulles Airport?

THE COURT: I assume they say this does indicate something about intelligence.

MR. DUNHAM: Doesn't say anything about intelligence. Since May we have been hearing about the intelligence value of Mr. Hamdi. I can't see him because it will interfere with the intelligence gathering operation that's going on. But, yet,

Mobbs doesn't say anything about intelligence gathering.

THE COURT: Well, Mr. Dunham, you know, it does take time to process intelligence, does it not?

MR. DUNHAM: Well, just as Justice --

THE COURT: They can keep him in solitary long enough maybe they can promise to get him out of solitary if he tells them what they want to hear.

MR. DUNHAM: Just as Mr. Garre quoted during Chief Judge Wilkinson during oral argument, I would like to quote from Justice Douglas in a concurring opinion in the United States v. United States District Court where it says that the government's desire to fortify its intelligence collage does not justify the extension of the detention of an American citizen.

And just holding him for intelligence reasons doesn't square. But, more importantly, we're here to talk about the Mobbs' Declaration. And Mobbs doesn't say he's in the Norfolk brig for intelligence gathering purposes. In fact, what is curious to me, and I agree with Your Honor's observation completely, that sometimes a declaration like that, it speaks louder for the things it doesn't say than the things that it does say. And I can't help but scratch my head and say we're challenging -- we filed this writ of habeas corpus because Mr. Hamdi was in the Navy brig in Norfolk and we thought he was going to be charged with a federal offense and they were just

holding him there. So we filed the petition for writ of habeas corpus. He's in the Navy brig. That's the detention we're challenging.

If that's the detention, Mr. Mobbs never chooses to discuss. He never says why he's there, why he's being held there, what terms or conditions he's being held under. And, yet, that is the detention that's before this court, not what happened on the battlefield in Afghanistan, not what happened when they moved him to Guantanamo. The detention we're hoping you're trying to focus on is why is he in the Navy brig in Norfolk. That's the question we ask. We have seen press reports, and I guess, you know, they have been alluded to, but we've seen press reports that talk about the fact that he was brought here to prosecute him. They brought him to Dulles Airport. They were going to bring him to the Eastern District of Virginia to Alexandria, but, oh, somebody in the Justice Department didn't want him, so they sent him down here to the Navy brig. Well, that's just press. Maybe you can't believe this. But you would think that Mr. Mobbs in explaining the detention of Mr. Hamdi in Norfolk would at least mention Norfolk somewhere in his declaration. He doesn't have a word about it. And, to me, that speaks louder than anything else.

Now, when they brought Mr. Hamdi to Norfolk they brought a bunch of other problems because they have to address 18 U.S.C. 4001(a). Now, Mr. Mobbs never explains in his

declaration why that general statute doesn't apply in this case.

THE COURT: Well, it certainly says that he has to have a trial, doesn't it?

MR. DUNHAM: It says he has to have a trial. It says in the -- and the Supreme Court has talked about that statute. Granted, that they spoke of it in dicta, but in Howe v. Smith in the ABA report -- the ABA has just come out with a report cautioning courts to handle these proceedings with care.

THE COURT: I read the -- you-all gave me all this stuff. You keep me awake all night reading this stuff, Mr. Dunham, I tell you.

MR. DUNHAM: The ABA report quotes Justice Burger as saying 4001, the plain language of 4001(a) prescribes detention -- proscribes detention for any kind of -- of any kind -- proscribes detention of any kind by the United States absent a congressional grant of authority to detain.

Now, Mr. Mobbs' Declaration does not explain -- that wouldn't apply to Mr. Hamdi if he was in Afghanistan.

THE COURT: It wouldn't apply to Mr. Hamdi if he was in Guantanamo.

MR. DUNHAM: It wouldn't apply to Mr. Hamdi if he was in Guantanamo. But when they bring him to Norfolk it applies. Now, they had to know that when they brought him here. And the government's presumed to know what the law is. And there's got

to be some reason why they think it doesn't apply or why they don't have to honor that, and it ought to be in the Mobbs' Declaration because we're talking about his detention in Norfolk, not what happened elsewhere.

I mean, how can you question the sergeant on the battlefield when there is still smoke coming out of the barrels and he's wrapping up a gaggle of guys? You know, by the time you get removed from that situation, and there's been some sorting out, and there's been some reports, and there's been some screening, and there's been some determinations made, by the time you get to that point you've got a lot of information, and you ought to be willing to share it with the judge in a habeas corpus proceeding; otherwise, the whole proceeding is a sham. To say, oh, whoa, the courts are open for habeas corpus --

THE COURT: You'll have to argue that before the Court of Appeals, Mr. Dunham. As far as I'm concerned here today, the Court of Appeals has said I have to determine if the Mobbs' Declaration is sufficient. I realize that you consider the habeas should have certain rights, a person in this proceeding; however, we're concerned with the sufficiency of the Mobbs' Declaration.

MR. DUNHAM: I understand, Your Honor.

THE COURT: You can argue that. You can go to the Supreme Court, and they'll tell you you have a right to speak

to him.

MR. DUNHAM: Well, I think that --

THE COURT: I can't do anything about that. I am interested in the Mobbs' Declaration, Mr. Dunham.

MR. DUNHAM: I will point out --

THE COURT: It's interesting to me because in reading -- I assume it was Mr. Saltzburg who was a professor at the University of Virginia before he was a professor at GW had a great deal to do with writing that brief. How it got filed here is interesting, but you-all filed it, and I took the time to read it. It is interesting because the Geneva Convention does say if there is a doubt about the status of an individual he should be before a competent tribunal, which is what the Army regulation or the Navy regulation -- it's interesting here, also, that this was not an engagement in which any Americans were involved in any capture or in any battle, if there was a battle. We don't know if he was in any battle. May not have been in any battle at all.

MR. DUNHAM: There is nothing in the Mobbs' Declaration to indicate that he fought anyone.

THE COURT: That's correct. There is not -- there is an indication that he had a weapon.

MR. DUNHAM: That's right. Indication he had a weapon.

THE COURT: The oddity is that one of the problems

that I see that's tantamount in anything is to understand what it is that is considered on each side. How do the Northern Alliance distinguish themselves from the Taliban? How can the Taliban distinguish themselves from the Northern Alliance? Are there distinguishing characteristics so that they know who they're shooting at if they're shooting at each other? And how is it that they change sides so often?

MR. DUNHAM: That --

THE COURT: All of those questions are questions that have been raised by the press and certain other people concerning -- and it creates real problems in my mind. But you're quite correct, there is nothing in here that says he's an unlawful combatant. They never said that.

MR. DUNHAM: And there is nothing in there that says --

THE COURT: What worries me is there is nothing to say that he was ever involved with any U. S. people.

MR. DUNHAM: There is nothing to say that he was even -- that he even fought anybody. Nobody provides us a definition of the term enemy combatant. It's thrown around by everybody.

THE COURT: Well, in Quirin they didn't battle anyone. They just came ashore prepared to do so. And, Mr. Dunham, you have to understand that, because in Quirin they were captured prior to the time when they had an opportunity to

battle. Here the thing that worries me is the "if necessary" he would fight. I didn't know why or what would be, in his opinion, necessary.

In any event, you continue. I've interrupted you, Mr. Dunham.

MR. DUNHAM: The enemy combatant designation in my view --

THE COURT: That makes him a prisoner of war is what you're saying?

MR. DUNHAM: That's right. The regulations talk about the fact that, hey, if you don't know what he is, before you can make him an unlawful you've got to give him a tribunal.

THE COURT: That's right.

MR. DUNHAM: Whether he's a civilian detainee or whatever he is, you can't treat him less than as a prisoner of war without giving him the benefit of that process, which hasn't been done here.

THE COURT: Now, what is the effect of the Geneva Convention to non-signers of the Convention?

MR. DUNHAM: Afghanistan is a signer of the Convention, and the Taliban was the lawful government of Afghanistan.

THE COURT: Well, now, that is a serious question, isn't it, Mr. Dunham?

MR. DUNHAM: Let me --

THE COURT: The government that was recognized by the United States was not the Taliban; is that correct?

MR. DUNHAM: Well, when the conflict began the Taliban was the governing party of the -- governing body of Afghanistan and was recognized internationally as the government of that country. We replaced that government in December of 2001 and installed a new government, which we have recognized and which we have gone so far to say we are at peace with, and which we have gone so far as to remove regulations on the books declaring a state of emergency with that government. And that government has members of the Taliban in it.

THE COURT: Well, it does. I know it does. And that creates a lot of problems because, knowing the history of the area, and realizing what warlords were doing, and realizing that pillage and plunder is a means of -- economic means of success in the East and has been for centuries -- it's nothing that's new to history. Any student of the Near Eastern history can tell you that pillage and plunder were constant utilizations by various leaders of one kind or another, sometimes under certain religious aspects or certain sets of certain religions in order to pillage and plunder. And these warlords would collect tribute. That's what it was all about.

MR. DUNHAM: That's why the Mobbs' Declaration is further inadequate, because it does not answer the very specific question that the Court asked when we were here last.

This court asked the question lastly, with whom is the war I would suggest that we're fighting? Is it with the government of Afghanistan?

Now, nobody answers that question. Mobbs certainly doesn't answer it. There are a myriad of public statements by the President that would allow this court to draw conclusion as to what -- whether we're still at war with the government of Afghanistan or not. But I think that even if --

THE COURT: We're certainly not at war with the present government of Afghanistan, Mr. Dunham.

MR. DUNHAM: We threw out one government, and there is a new government.

THE COURT: To the victor belongs the spoils. That's what plunder is about, isn't it? Pillage and plunder. To the strong -- the strong take over the weak.

MR. DUNHAM: But when you take over, the conflict is over. You don't keep holding --

THE COURT: Well, the conflict isn't over because the weak wants to reassemble and remove the strong, and maybe they will get strong again. That's what they have been doing for, what, 1,000 years, 2,000 years, 5,000 years?

MR. DUNHAM: Isn't that all internal to Afghanistan at that point?

THE COURT: No, it isn't.

MR. DUNHAM: What you have is in order for the United

States to hold somebody as an enemy combatant there has to be an international conflict in which the U. S. is involved.

THE COURT: Does it have to be an enemy of the United States? That's the question, Mr. Dunham. Or is it an enemy of some other -- I mean, if you're the enemy of my enemy, are you my -- if you're the enemy of my friend, are you my enemy? I guess you are.

MR. DUNHAM: You know, I can't get into that, but at least it would seem to me you have to do something, not just intend to do something, that you have to actually do something. And I'm not sure that the government has any -- there is nothing in the Mobbs' Declaration that indicates that Mr. Hamdi did anything other than go to Afghanistan to fight, if necessary. And I think that the failure of the Mobbs' Declaration to say that Mr. Hamdi was an actual combatant, actually took place in combatant activities --

THE COURT: There is no indication that he actually --

MR. DUNHAM: Nothing in there.

THE COURT: And if there were, he probably would have been tried by now, had an opportunity to counsel, and do all those things, but he didn't, so they're not trying him for that. They just want to keep him there for intelligence purposes, I gather, but that doesn't -- you're right, it doesn't say so in the Mobbs' Declaration, does it?

MR. DUNHAM: No, Your Honor. I go back to the fact if we didn't have an international conflict with Afghanistan you wouldn't be able to have -- to invoke the rules of war which the government invokes as its right to hold people as enemy combatants. In other words, the existence of a state of --

THE COURT: What you're really not getting to, Mr. Dunham, is anyone who is considered to be a terrorist, then, is an enemy combatant, so if you are a terrorist you're an enemy combatant, are you not, because that's who -- that's what the regulation said against enemy -- groups or individuals, so doesn't make much difference. If the man next door to you is an enemy combatant and they say he's an unlawful enemy combatant, maybe the military, the President, or Mr. Mobbs could figure out if he's an enemy combatant.

MR. DUNHAM: That's what's scary.

THE COURT: Maybe we could eliminate all these guns in the areas. Just say they're enemy combatants.

MR. DUNHAM: If you had a gun and you had an intent, you're an enemy combatant, you don't need a trial. We just lock you up forever. That's the concern here.

THE COURT: We're not going to lock anybody up forever in this country. This question here is really this man was in a fighting situation, Mr. Dunham. He was where the fight was. And that's a real problem.

MR. DUNHAM: That's correct.

THE COURT: If he had a weapon where the fight was, they certainly have a right to corral him. What worried me more about this case than anything else is they were corralled not by U. S. forces. He was corralled by these groups of people who comprise what they call the "Northern Alliance", which is really a group of various leaders or what one would normally term sort of a lord of a certain area. You know, feudalism existed well into the century in the Ottoman Empire, so that there were these various sort of fiefdoms. And it was strong people that were able to create these fiefdoms. There isn't any question about it. And they fight one another constantly and have constantly. What worries me is he happened to be in one of these fiefdoms.

MR. DUNHAM: Well, what is the problem with all of that, of course, is that we have absolutely no detail with regard to the circumstances under which he was initially captured. And as Your Honor has pointed out, he was allowed to keep his weapon. That doesn't sound like much of a capture to me. It almost sounds like a potential changing of alliances or whatever. We don't know what happened. And I'm sure the U. S. government knows what happened, but they haven't chose to present it to the Court. And that's further part of the problem. They're asking the Court to deny the petition for writ of habeas corpus on basically guesswork. They're asking

the Court to guess and fill in the blanks in the Mobbs' Declaration without providing the information that would make the Court feel comfortable in acting.

For that reason we believe the declaration is not adequate. We recognize that the government probably should be granted time to submit additional information because of the way the Court of Appeals suggested the Court should proceed, but were we here for final argument on this case and there was to be -- everybody had had a chance to put into the record the evidence they wanted to put into the record, I would submit that the current record is not adequate to justify the detention here.

THE COURT: Thank you, Mr. Dunham.

All right, Mr. Garre. You've heard Mr. Dunham's argument. Tell me what your reply is to his argument.

MR. GARRE: Thank you, Your Honor.

First, I want to be clear that the government's position is that someone who surrenders with an enemy unit and turns over his AK-47 to the forces that capture him is an enemy combatant, that that person doesn't need to actually fire his weapon at anyone, at his captors. He certainly doesn't have to fire his weapon at United States soldiers in Afghanistan in order to meet that definition.

THE COURT: He was there to fight. And that's correct. My problem was -- I am having a little problem with

that, but I may -- it may be sufficient. It may not be sufficient.

Mr. Garre, what is concerning me are certain things he said. There is nothing that Mr. Dunham raised, which are excellent points, and there is nothing in here to say he was an unlawful enemy combatant.

MR. GARRE: With respect, Your Honor, we think under the some evidence standard we have explained in our motion to dismiss that applies here, which is that the military has to provide a factual basis for its determination that Mr. Hamdi is an enemy combatant, that this declaration meets that standard. And we think that although Mr. Dunham tries very hard --

THE COURT: You have to describe the standard. You offered it to the Fourth Circuit, but they said no.

MR. GARRE: Maybe I'm not making myself clear, Your Honor. In our motion to dismiss we explained that a court in this certain situation applying a factual inquiry into the government's designation could look only to whether or not the government -- the executive has supplied some basis, some evidence of factual --

THE COURT: All they have to do is say he's an unlawful combatant, and that's the end of it. Is that it, Mr. Dunham?

MR. GARRE: That certainly wouldn't be a fair characterization.

THE COURT: They said he was an enemy combatant. They haven't said he's unlawful.

MR. GARRE: The Mobbs' Declaration, it provides the grounds and circumstances. I think it's important to focus, as Your Honor did earlier --

THE COURT: Where does the Mobbs' Declaration show he was an unlawful combatant?

MR. GARRE: First, as we said, and this was at page eight, note five of our motion to dismiss, whether Mr. Hamdi is an unlawful or a lawful combatant, enemy combatant, is not relevant to the military's authority to hold him. The Quirin --

THE COURT: So number one, you can hold a prisoner of war. If he's a lawful combatant, then he's a prisoner of war; is that correct?

MR. GARRE: That certainly is correct, Your Honor. And the Quirin case makes that quite clear when it distinguishes between lawful and unlawful combatants and the authority of the captors in both situations to detain those persons whether they're regarded as lawful, unlawful. The Fourth Circuit decision in this case also makes clear if indeed Mr. Hamdi is an enemy combatant who was captured during the hostilities in Afghanistan then his present detention is lawful.

Now, the bulk of Mr. Dunham's submissions --

THE COURT: The Court of Appeals has already ruled, so I don't have to do anything; is that correct?

MR. GARRE: No, Your Honor.

THE COURT: Is that your position? Is that your position?

MR. GARRE: No, Your Honor.

THE COURT: They will tell Mr. Dunham take it to the Supreme Court.

MR. GARRE: It's not. I think I wanted to make clear a number of the arguments Mr. Dunham was making here today are legal arguments that are rejected by, if not just simply flatly inconsistent with, the Court of Appeals ruling, which is well supported by other precedents that we cited in our motion to dismiss.

THE COURT: It's interesting to me, Mr. Garre, because I tried valiantly, valiantly, to find a case of any kind in any court in which a lawyer was not entitled to consult with his client. I must tell you this case sets the most interesting precedent in relation to that that has ever existed in Anglo-American jurisprudence since the days of the Star Chamber.

MR. GARRE: Well, with respect, Your Honor, we would disagree with that characterization. Again, to go back to the comment that Chief Judge Wilkinson made during the argument in the Court of Appeals case which recognizes since time

immemorial those captured in warfare have been detained without charges and without counsel --

THE COURT: I'm not questioning any capture in warfare, nor am I questioning that at all. Mr. Dunham has raised an interesting point, a very interesting point. He says a person was brought here ostensibly to be tried in this court, or in Alexandria at least, in the Eastern District of Virginia, for whatever they wanted to try him for, because he was an American citizen. He obviously is not being kept with the other combatants, which is required both by the regulation and the Geneva Convention -- there is no question about that -- which would require him to be kept with other people of similar import.

MR. GARRE: But, Your Honor --

THE COURT: He raised the point about why was he brought to the Navy brig in Norfolk.

MR. GARRE: The logic of that conclusion -- the logic of that argument leads to the conclusion that can't -- with respect, we don't think that can be right that the military can capture and detain combatants on the battlefield. Once it's done that during a period of active and ongoing hostilities it can't bring those combatants back to American soil as it did in the case of thousands of individuals during World War II, that the military -- the law prevents the military from holding individuals at other facilities that might be safer for the

United States military or that might be more conducive to other aspects of the war effort.

THE COURT: What's unsafe about this fellow they have to keep him incommunicado, in solitary confinement, other than the fact that he happened to have been born in the United States? Is he being punished because he was born in the United States? Is that why he's -- listen. I think it's punishment. The Supreme Court thinks isolation is punishment also. They've had decision after decision. Of course, you can keep people in isolation. You can give them some due process. They're entitled to some hearing. You put them in isolation because of disciplinary matters or there is an administration reason for keeping them in isolation or they may be trying to escape or many other things. You can keep them in isolation.

How long you can keep them in isolation, all of these factors begin to weigh. Does a court -- shouldn't a court take notice of that? You say they didn't raise the questions of that. But is that --

MR. GARRE: They have, as I understand it -- and I'm reading from their traverse, which says that they are not challenging the conditions of Mr. Hamdi's confinement. We don't think -- and we've explained this in our return to Your Honor's questions about the alleged fact he was held in solitary confinement. As I tried to explain earlier, he's not being held in solitary confinement in the sense that that term

is traditionally used.

THE COURT: What is solitary confinement in your sense? Does it mean that you can speak with -- solitary confinement, do you speak with your captor?

MR. GARRE: Well --

THE COURT: I mean, what is it? What do you say, he's not being kept --

MR. GARRE: Mr. Hamdi now is the only enemy combatant --

THE COURT: From a standpoint of something that's brought to the Court's attention, that concerns me in relation to the real problem of due process of a person in custody who is unable to communicate with the world.

MR. GARRE: The government's position, and we've stated this and tried to make it clear in a motion to dismiss, is that its detention of Mr. Hamdi as a captured enemy combatant is lawful whether Mr. Hamdi was in Afghanistan, whether Mr. Hamdi was in Guantanamo, or whether he's in the Norfolk Naval Brig. The military made the determination to move Mr. Hamdi to the naval brig. He happens to be the only enemy combatant at that facility.

THE COURT: So, therefore, he can be held --

MR. GARRE: He is not -- as I said, he receives visits.

THE COURT: You have another one down in South

Carolina. Why did you move that fellow down to South Carolina and Hamdi here, so they couldn't talk to one another and thereby be some intelligence problem; is that correct?

MR. GARRE: Your Honor, I'm not in a factual position to answer that question. The military made that determination. It may have been based on the different facilities under --

THE COURT: Did the military make it or did the Department of Justice make it?

MR. GARRE: My understanding is the military made that determination. As I said, I'm not in a factual basis to provide anymore information on that, nor do I think it's relevant to the habeas proceeding in this case.

THE COURT: I must admit it is not really relevant to the habeas proceeding except that an individual is being held incommunicado for a number of months, and the Court is ever mindful of that, and then the intelligence one receives from that has been held -- you know, one of the major problems -- I don't want to go into that.

MR. GARRE: Your Honor, if I could address another statement that Mr. Dunham --

THE COURT: I think fundamental fairness to people says we are not treating you as an animal, we are treating you as a person, we don't have you in a cage, we allow you to communicate. People are social by nature, aren't they?

MR. GARRE: Mr. Hamdi, as I said earlier, receives

visits every day from the commanding officer. He meets several times a week with the chaplain at the facility. He meets with the doctor every week.

THE COURT: Is he a Christian or what is he?

MR. GARRE: Your Honor, I don't know the answer to that question.

THE COURT: Is the chaplain a Mohammed chaplain or Christian chaplain? Is he -- I don't know what Hamdi is. All I know --

MR. GARRE: If the Court's concern is about personal contact, I think it's the fact of the contact that's significant.

THE COURT: So personal contact, he is able to meet with his interrogators every day?

MR. GARRE: Your Honor, I want the government's point to be clear that the lawfulness of the present detention in this case isn't dependent on any --

THE COURT: But it has to weigh on my mind. He's still a human being.

MR. GARRE: I think the authorities that we have set out in our motion to dismiss and the Court of Appeals recognized were to call it the long established authority of the military to detain captured combatants during the period of hostilities authorize the detention in this case. The Mobbs' Declaration provides what we think is the factual basis

necessary for --

THE COURT: Let me ask you, Mr. Garre. You probably know. You probably know. Was it a battle or was he just surrendered?

MR. GARRE: The declaration says what it says, which says that he surrendered and gave his firearm to the Northern Alliance forces. That's in paragraph nine. It says he went to Afghanistan to train and fight with the Taliban.

Mr. Dunham, if I understand his arguments today correctly, doesn't dispute, and he certainly did not dispute in the petition, he was in Afghanistan or that he surrendered to these forces or --

THE COURT: Doesn't make much sense.

MR. GARRE: His central position seems to be --

THE COURT: He's never talked with Hamdi, hasn't seen a statement by Hamdi. The only information he has about Hamdi is what you gave him, which is darn little.

MR. GARRE: His argument seems to be he can't be an enemy combatant because he wasn't shooting at United States forces or other forces.

THE COURT: That doesn't have anything to do with it. And I understand that. That doesn't have anything to do with whether he's an enemy combatant.

MR. GARRE: Another thing in the government's view that doesn't have anything to do with that determination is Mr.

Dunham's argument -- suggestion that the war with the Taliban is over.

THE COURT: Let's talk about something else a minute, Mr. Garre.

Suppose I said that I felt that this was not sufficient and that he is an enemy combatant according to them, but he may or may not be. Then you'd have no trouble convening a military tribunal, as the treaty and as the regulations require, in short order, wouldn't you?

MR. GARRE: With respect, Your Honor, I tried to explain why we don't think those regulations are required. We think --

THE COURT: So you wouldn't do it if I gave you some time? Is that what you're telling me, Mr. Garre? If you tell me you wouldn't do it if I gave you some time, I won't waste your time.

MR. GARRE: Your Honor, I'm not in a position here to say what the military would or would not do. What I'm here to say is --

THE COURT: All you have to do is answer. Do you want some time or not, Mr. Garre? I'm going to give it to you on a platter. If you want it, you can take it. If you don't want it, tell me I don't want it.

MR. GARRE: We would ask the Court to find that the Mobbs' Declaration is sufficient and to grant the government's

motion to dismiss. If the Court is not prepared to do that, then we would ask for some time to consider whatever order it would be that the Court would issue as to how proceedings would proceed.

THE COURT: I'm not going to issue any order, Mr. -- I may just say the Mobbs' Declaration is insufficient and give you the reasons for it. In that case, Mr. Garre, if that's what you want, you may find yourself in a position that's ridiculous. Do you understand that? I said -- you can come back tomorrow. You better consult with somebody, Mr. Garre.

MR. GARRE: Yes, Your Honor.

THE COURT: Please consult with somebody, will you?

MR. GARRE: Your Honor, the government would be happy to consult, but I do want the government's position to be clear that the Mobbs' Declaration is sufficient.

THE COURT: I understand the government's position. I'm trying to offer you something nicely, Mr. Garre, but, if you don't want it, you don't have to take it. And all you have to say is, Judge, I don't want it. That's all you have to say. It's just that simple.

MR. GARRE: Your Honor, as I said, if the Court's conclusion is that the declaration is not sufficient, then the government would like some time to consider what the proper course would be at that point. But if, on the other hand, we would -- we have asked the Court to find that the Mobbs'

Declaration is sufficient and to grant the government's motion to dismiss.

THE COURT: I don't want to stop you from taking up an appeal, I guess -- I certainly don't want to do that, Mr. Garre -- if I decide it's insufficient. It appears that it has some great omissions.

MR. GARRE: I don't want to go back and go over ground we've already been through, but we do think --

THE COURT: He has raised some interesting points that I didn't raise. One is an unlawful combatant was not mentioned. And so --

MR. GARRE: If I could address that point. I think it's not relevant to the government's authority to detain Mr. Hamdi. We said that in page eight, note five, of our petition.

THE COURT: So you're no longer trying to maintain that he's an unlawful combatant insofar as the Mobbs' Declaration is concerned, correct?

MR. GARRE: The Mobbs' Declaration states that he was with a Taliban unit and surrendered and turned over his firearm. Now, the President has determined that those captured combatants who were with the Taliban or the al-Qaida are unlawful --

THE COURT: Show me that, where the President has determined anything.

MR. GARRE: I think that's laid out in Judge Ellis'

decision which we referred to.

THE COURT: I'm not worried about Judge Ellis' decision. He isn't here.

MR. GARRE: We referred to it in our legal papers.

THE COURT: Just so you understand, I'll tell you one more time. He's in Alexandria, okay? He's a very, very intelligent, well-reasoned judge. And I'm sure that his decisions have good basis for all of us.

MR. GARRE: The decision --

THE COURT: But he may have been presented with evidence that I have not been presented with.

MR. GARRE: There wouldn't be any evidence to that determination because he's relying on the President's determination --

THE COURT: How do you know? He had all kinds of information, didn't he?

MR. GARRE: It's laid out in the decision where he explains why the President -- he explains the President made this determination. And he concludes that the Taliban falls, in his words --

THE COURT: Stop a minute. So he has made a decision? The President has made a decision that Hamdi is an unlawful enemy combatant?

MR. GARRE: No, Your Honor. The President has determined that the detainees who were captured as Taliban or

al-Qaida, because of their association with the Taliban or the al-Qaida, do not meet the criteria under Article IV of the Geneva Convention for prisoner of war status and, therefore, are unlawful combatants.

THE COURT: Certainly the President is entitled to great deference in relation to the determination of an enemy combatant. No question about that. Whether one meets the criteria set forth in the Geneva Convention is a matter of law; is that correct?

MR. GARRE: Well, we think it's a matter in which the President should have the final say, but Judge Ellis went further --

THE COURT: If the President said that the Geneva Convention says you don't need a military tribunal, then whatever is in the Geneva Convention can be ignored; is that correct?

MR. GARRE: We think that the President is the final say on that political question, and --

THE COURT: I'm not talking about a political question. I'm asking you about a question of law. Isn't it a question of law whether a treaty applies or does not apply?

MR. GARRE: It can be in the appropriate context, yes, but the question of whether or not detainees are considered prisoners of war or that they fall into a different status, that ultimate determination was made by the President

here, and we think -- Judge Ellis went further and discussed the criteria. He said in his words that the Taliban falls far short of meeting the criteria for a POW. And more importantly --

THE COURT: They may indeed fall short, because he indicated that they had no command units and that they had no designation and so forth. But nobody has given me that information. You have said to me we're not giving you anything, Judge.

MR. GARRE: Your Honor, we have presented the Court --

THE COURT: That's what you told me in no uncertain terms, didn't you, Mr. Garre?

MR. GARRE: We presented the Court with the Mobbs' Declaration.

THE COURT: You said we don't have to submit anything, we have the Mobbs' Declaration, and we want to rise or fall on it; isn't that right, Mr. Garre?

MR. GARRE: The government has explained in its motion to dismiss that the Mobbs' Declaration is adequate, it provides more than adequate factual basis for the military's determination that Mr. Hamdi is an enemy combatant.

THE COURT: You didn't want to give me any of Mr. Hamdi's statements, did you?

MR. GARRE: Your Honor, we submitted the Court with

the Mobbs' Declaration. And we think under the governing standard --

THE COURT: I tell you, it's hard to get an answer out of you, isn't it?

Well, you didn't. So I'll put it that way. How is that? You filed a thing saying you weren't going to do it; isn't that correct? And then you went to the Court of Appeals, and they said I have to look at this before I can do anything else.

MR. GARRE: We respectfully asked for relief from this court's order because we did think the Mobbs' Declaration would be sufficient. Now, if the Court were to conclude otherwise, then, as I said earlier, the government would have to consider its options, but we do think that the Mobbs' Declaration is sufficient. And that goes back to the cardinal principles of the Fourth Circuit recognized in its decision.

THE COURT: The problem I have is I have no desire to have an enemy combatant get out of any prisoner of war status he may be in, whatever the status is, whether he's illegal or legal or whatever you want to call it; however, I do think that the process requires something other than a bare assertion by someone by the name of Mobbs that they have looked at some papers and, therefore, they have determined that he should be held incommunicado. Just think about the concept of that. Is that what we're fighting for?

MR. GARRE: Your Honor, I think the authorities we've relied on, the Court of Appeals relied on, is the established -- long established, in the Court of Appeals' words, authority to capture and detain enemy combatants. The Court of Appeals recognized if Mr. Hamdi is indeed an enemy combatant captured in Afghanistan during the hostilities his present detention is a lawful one. This is --

THE COURT: Why, therefore, should we not see what the basis of this decision -- why it was made? Why is it so fearful that we should see the facts upon which that decision was made?

MR. GARRE: Your Honor, I think that the Mobbs' Declaration does provide the central criteria on which that decision was made. It explains that Mr. Hamdi went to Afghanistan to train with and, if necessary, fight with the Taliban. It explains Mr. Hamdi surrendered to Northern Alliance forces, gave -- turned over his AK-47 to those forces.

THE COURT: Does Hamdi agree with that? Did Hamdi agree with that?

MR. GARRE: Your Honor, paragraph nine states in a subsequent interview Hamdi has confirmed --

THE COURT: I understand what paragraph nine said. I asked you, did Hamdi agree with that?

MR. GARRE: The declaration says what it states, and that's what the government --

THE COURT: That's just --

MR. GARRE: The declaration makes clear Hamdi's own statements confirmed the government's determination.

THE COURT: The declaration says -- you know, I can -- Mr. Garre, I've been around too long.

MR. GARRE: Your Honor --

THE COURT: I've heard too many people make explanations of what certain things are. You know, I don't know why we can't see the facts, but we can't.

I'll look at this declaration. I will take some time and go over it again with a view in mind to what you've said, Mr. Garre, concerning the President. I will take into consideration that Judge Ellis has made a particular decision. And I will take into consideration those things that Mr. Mobbs, whomever he may be -- nothing in here to say he's even an employee of the United States, but maybe some consultant or another. And he may be an excellent person. I'm not in any way reflecting on him, other than the fact this declaration doesn't tell me very much about him. Just didn't. He may be the most knowledgeable person about the East that ever has come down the pike. He may have read all the history books on Afghanistan, on the Near East.

MR. GARRE: Your Honor, the declaration explains his substantial involvement with these operations in paragraph one.

THE COURT: Mr. Garre, it's being -- I can be

familiar -- I'm familiar with the operations of this court, and that doesn't mean that because I think someone is guilty that they're guilty. A jury decides that. I may disagree with a jury. I may come to an entirely different conclusion than a jury after listening to the same evidence. So people may see or hear things differently.

MR. GARRE: The declaration also explains the military authorities in Afghanistan interviewed Mr. Hamdi and made this determination.

That goes to another point the Court raised about ambiguity about Northern Alliance forces or the conflict and struggle in Afghanistan. That's precisely one of the reasons why courts should defer to the military in making these sorts of determinations.

THE COURT: I'm trying to defer to the military. I go to the military regulations. You don't want to do those. You don't want to follow them. And, yet, I said, okay, then give me some information why you don't want to follow regulations. And you said we don't think they apply because he's an unlawful. But it doesn't say he's unlawful in here, as Mr. Dunham has pointed out.

MR. GARRE: It does say he is being considered as an enemy combatant because of his association with the Taliban. The President has determined the Taliban --

THE COURT: If that means he's a member of the unit

or he just went there -- he may have gone there to train with them. It may be sufficient. I don't know. I'll look at it, Mr. Garre.

MR. GARRE: Thank you, Your Honor.

THE COURT: You may sit.

Anything else you want to tell me that you haven't brought up? Anything else? Anything else?

MR. DUNHAM: I just have one brief point, Your Honor.

THE COURT: I'll give Mr. Garre an opportunity to answer your one brief point, Mr. Dunham. Go ahead.

MR. DUNHAM: Mr. Garre repeatedly says we're not challenging the conditions of his confinement. What we're challenging by writ of habeas corpus is the basis upon which he's being confined, and we're saying he's not being confined as an enemy combatant in the Norfolk brig. He's being confined as an unlawful combatant. That's how he's being treated.

And we point to the -- we say that detention as an unlawful combatant is unlawful. We say that solitary confinement since 1890 -- this is a case in 1890 where they said solitary confinement was punishment of the worst kind. Here is what this gentleman had. This gentleman had access to attendants, the jailers, physician, spiritual advisor of his own selection.

THE COURT: That was --

MR. DUNHAM: Members of his --

THE COURT: Not even an Army chaplain? He gets to choose what kind of chaplain?

MR. DUNHAM: Right. Members of his family could visit him. And he had access to counsel. And, yet, they said that was punishment of the worst kind. That's in 1890. One would think --

THE COURT: What's the name of that case?

MR. DUNHAM: In re: Medley. It's cited in our brief.

One would thing in over a hundred years we would have a little more enlightened view of things than they had in 1890. But, nevertheless, our point is he's being detained unlawfully. That's the purpose of the writ of habeas corpus. He's being detained as an unlawful enemy combatant, or worse, he's being detained as somebody who they just don't like and so they slapped a label on him and they're going to hold him that way. We don't think it's permissible. We don't think it's allowed for all the reasons we've stated.

THE COURT: All right, Mr. Garre. You've heard his position on that. Do you want to reply?

MR. GARRE: Your Honor, I just would refer the Court to what is in our papers and that we've already stated, and what the Fourth Circuit said, that if Mr. Hamdi is indeed an enemy combatant captured during hostilities in Afghanistan his present detention is a lawful one.

THE COURT: Let me ask you a question. The military

can do anything they want with him if that's the case; is that correct, without any tribunal, without anything? They can do anything?

MR. GARRE: What the military has said is it's treating the detainees --

THE COURT: I didn't ask you what they were doing with them.

MR. GARRE: -- humanely.

THE COURT: I'm asking you as a matter of law can they do anything with him they want? Under your theory of law can they?

MR. GARRE: I think that his present detention is lawful if he's an enemy combatant.

THE COURT: I didn't ask you about the present detention. I'm asking you as a matter of law if a person is an unlawful combatant can the military do anything they want with him? What restraints are there on the military if he's an unlawful combatant? What restraints? Any?

MR. GARRE: Your Honor, I think under the authorities that we've relied upon, that the authorities made clear that --

THE COURT: Any restraint the military has?

MR. GARRE: -- the detention is lawful, that the military has made clear they're treating the detainees humanely and consistent with international law.

THE COURT: Can I beg you to answer my question? My

question is simple. As a matter of law -- we're just talking about the law now, nothing else. Assuming that a man is an unlawful combatant, what restraints are there on the military in relation to treatment?

MR. GARRE: I think the same restraints, if there are restraints, that would apply to Mr. Hamdi would apply to the Guantanamo detainees. And they would be the ones that Judge Kollar-Kotelly referred to in her recent decision, which is --

THE COURT: Okay. Prisoner of war restraints would apply to Hamdi; is that correct?

MR. GARRE: No, Your Honor.

THE COURT: You're saying the same restraints. I'm asking you what restraints. You know, define it. Tell me, what is the restraint, any restraint, anything?

MR. GARRE: Your Honor, I would refer the Court to Judge Kollar-Kotelly's recent decision in the Guantanamo --

THE COURT: I didn't ask you about somebody else's case.

MR. GARRE: I'm trying to answer your question by doing that. With respect, Your Honor, she referred to --

THE COURT: Tell me what you contend they are. Then you can recite what authorities you have.

MR. GARRE: They would be the international processes that take place between nations or nations, states, can communicate with one another on the appropriate conditions for

detainees.

THE COURT: Who communicates on behalf of unlawful detainees?

MR. GARRE: Well --

THE COURT: Unlawful combatants? Who is --

MR. GARRE: Your Honor, there have been communications with governments of --

THE COURT: What governments?

MR. GARRE: For instance, in this case Mr. Hamdi has made requests, as I understand it, to the Ambassador to Saudi Arabia.

THE COURT: Are we at war with Saudi Arabia?

MR. GARRE: No, Your Honor.

THE COURT: Then that's not the government he's battling for, is it?

MR. GARRE: We're talking about a different question, not whether or not we're at war with a particular government.

THE COURT: So his only recourse, then, is the government of the country of which he was a citizen, correct?

MR. GARRE: I don't think that that's correct, Your Honor.

THE COURT: So he has to depend upon them to contact the President of the United States in order to determine what restraints may or may not be imposed?

MR. GARRE: This question is not new. It was

addressed by the Supreme Court in the Eisentrager case. And it was addressed by Judge Kollar-Kotelly recently in the Guantanamo Bay detainees case. It's not a new situation.

The petitioners in this case have never relied on any claim -- and, again, the Court has to go back to the claims in the petition in this case and the Fourth Circuit decision in this case.

THE COURT: How can they go back in the petition when they can't even talk to Hamdi? How do you -- what happens here, you know, the government doesn't want anyone to talk to him other than some chaplain -- we don't even know if it's a chaplain of his own faith -- a chaplain, his custodian, and interrogators? And that's it, correct?

MR. GARRE: Those are the individuals I identified. We think the Fourth Circuit was right --

THE COURT: I must tell you -- have you ever read In Re: Medley? I don't know what it says.

What court is it out of, Mr. Dunham?

MR. DUNHAM: It's the Supreme Court, Your Honor.

MR. GARRE: As I understand it, that case is factually quite distinguishable arising under different contexts and raising different issues.

THE COURT: I'm sure. I haven't read it. I don't know. He will read it.

MR. GARRE: I think what is relevant -- and, again, I

point the Court to what the Fourth Circuit said in this case about Mr. Hamdi's present detention is it's lawful if the military has properly made that determination. And we think that it has.

THE COURT: So the military --

MR. GARRE: For the reasons --

THE COURT: If they sat him in boiling oil and they made that determination, would that be lawful?

MR. GARRE: I'm sorry? I didn't hear the Court's question.

THE COURT: If the military decided to put him in boiling oil, would that be lawful?

MR. GARRE: Your Honor, I don't think anyone has suggested that that has happened or would happen.

THE COURT: So some restraint on the military. What is the restraint?

MR. GARRE: If you go back and look at the Thomasson case in the Fourth Circuit, they talk about the political checks in the military, talk about the separation of powers in this sphere, and the Constitution does grant --

THE COURT: I certainly don't want to interfere with the military. I very much -- I no have no desire to. But I do have a desire to see people are treated as human beings. I have to see to that.

MR. GARRE: The President made clear the detainees

are being treated humanely.

THE COURT: I'm sure the detainees in Guantanamo from -- I've seen newsreels, or whatever you call it on television these days, where they talk to each other, they have lots of things, which certainly Mr. Hamdi does not have obviously.

MR. GARRE: Thank you, Your Honor.

THE COURT: And he's being treated differently, and we don't know why. Do you know why?

MR. GARRE: Your Honor, I believe the military has stated when it brought Mr. Hamdi to Norfolk that he was taken from Guantanamo when a determination was made that he possibly may be an American citizen. It's conceivable that Mr. Hamdi could be moved to a different facility. It's conceivable that other enemy combatants could be brought to Norfolk. When Mr. Hamdi was brought there he happened to be the only enemy combatant. And he is today.

THE COURT: Well, you may be right, Mr. Garre. You may absolutely be right under the -- it's possible. It seems somewhat strange, but it's possible.

MR. GARRE: Thank you, Your Honor.

MR. DUNHAM: Your Honor, without testing the Court's patience, there is one other point, if I could just briefly make as a result of what was said. If I could just make it real quickly.

That is this point that if he's an enemy combatant his detention is lawful is the product of the Fourth Circuit doing what it kind of said this court shouldn't do, which is reaching too far before the District Court got a chance to bite on it. It's purely dicta at this point. The Fourth Circuit only decided that I couldn't see Hamdi under the order that the Court originally -- that was the decision in the case. The rest of the language is purely dicta.

THE COURT: You have to take that up with them, Mr. Dunham. They put it out, and they've said it, and they've held it. That's the decision of the Court of Appeals that they made. They made it based on whatever Mr. -- I assume whatever they heard in argument. I don't know. Must have been on some record. If they did, that's it. I can't very well say anything else, but I can determine whether he's being held in accordance with the Army regulations and the Geneva Convention and whether the Mobbs' Declaration is sufficient. And that's as far as I can go. I can't go any further under the restraints given me by the Court of Appeals.

I'm going to follow those restraints, Mr. Dunham. Your only recourse is to go to a higher court, I'm afraid. I'm not higher than they are.

Okay. Anything else? Anything you want to add, Mr. Garre?

MR. GARRE: No, Your Honor.

THE COURT: Are you through, Mr. Dunham?

MR. DUNHAM: Yes, we are.

THE COURT: You'll hear from me in a couple of days. Let me think about this.

Court is in recess.

(Proceedings were adjourned at 1:10 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Penny Commander Wile, RMR, CRR

August 16, 2002

Date

PENNY C. WILE, RMR, CRR
OFFICIAL U. S. DISTRICT COURT REPORTER

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FILED
AUG 16 2002
CLERK, U.S. DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. CIVIL ACTION NO. 2:02cv439

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

ORDER

This case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer. Despite the fact that Yaser Esam Hamdi ("Hamdi") has not been charged with an offense nor provided access to counsel, the Respondents contend that his present detention is lawful because he has been classified as an enemy combatant. Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus ("Resp. Brief"), at 9. In denying the Respondents' Motion to Dismiss, the Court of Appeals for the Fourth Circuit rejected the Respondents' contention that the government's determination of Hamdi's status was beyond judicial review stating, "[i]n dismissing...with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." Hamdi v. Rumsfeld, No. 02-6895, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002) (emphasis added).

In this Court's hearing on the matter on August 13, 2002, the Respondents conceded that their determination of Hamdi's status was subject to judicial review. However, the Respondents argued

00000425

that the Mobbs Declaration that it attached to its Response, in and of itself with no further evidence of any kind, was a sufficient factual basis to provide this Court with information adequate to dismiss the writ of habeas corpus. For the reasons stated below, this Court finds the Mobbs Declaration insufficient and once again **ORDERS** the Respondents to submit to the Court the materials previously requested in its July 31, 2002, Order, together with the screening criteria utilized to determine the status of Hamdi with the name(s) and address(es) of the persons who made the determination. The Respondents' Motion for Relief from this Court's production order of July 31, 2002, filed August 5, 2002, is **DENIED**. This Court is highly cognizant of the Respondents' concerns regarding any national security implications of the requested materials. The Court reiterates that the materials are to be produced solely for in camera review, ex parte, by the Court, in order to insure that the documents will in no possible way affect national security. The Court **ORDERS** that the sealed documents be produced by 4:30 p.m. on Wednesday, August 21, 2002, to this Division of this Court for the Judge's in camera review.

Background

On September 11, 2001, the al Qaida terrorist network launched an attack on the United States resulting in approximately 3,000 fatalities. Seven days later, Congress responded by authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The President subsequently ordered United States armed forces to Afghanistan to subdue al Qaida and the governing Taliban regime that was supporting it. In late 2001, the Respondents contend that Yaser Esam Hamdi surrendered to Northern Alliance forces that were acting in conjunction with American forces during these military operations.

Although the circumstances of Hamdi's surrender and detention are anything but clear, he was apparently classified as an "enemy combatant" that met certain "screening criteria"[1] and turned over to U.S. military control. Hamdi was transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba together with hundreds of other detainees of like circumstances. It appears that the government, realizing that Hamdi was born in the United States, looked upon him somewhat differently. For reasons that are still unclear, Hamdi was subsequently transferred to the Norfolk Naval Station Brig, Norfolk, Virginia, U.S.A. in April 2002.

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham, filed a habeas corpus petition, naming as petitioners both Hamdi and himself as Hamdi's next friend. After holding a hearing on May 29, 2002, this Court concluded that the habeas corpus petition was properly filed and ordered that Hamdi be allowed to meet with the Federal Public Defender on June 1, 2002. On May 31, 2002, the Respondents filed a motion in the Court of Appeals for the Fourth Circuit for a stay pending appeal of this Court's access order on the grounds that there was an insufficient relationship between Hamdi and the Federal Public Defender. The Court of Appeals granted the Respondents' Motion.

While the Federal Public Defender's petition was submitted to the appeals court, Esam Fouad Hamdi, the detainee's father, filed a separate petition for a writ of habeas corpus naming as petitioners both Yaser Esam Hamdi and himself as next friend. On June 11, 2002, this Court found that Hamdi's father had properly filed his habeas petition as next friend, appointed the Federal Public Defender as

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[1] The Respondents have not produced the screening criteria to this Court and have stated that the criteria are classified. In its Response, filed on July 25, 2002, the Respondents went on to suggest that it could submit to this Court a copy of the screening criteria ex parte and under seal. Resp. Brief, at 3 n.1. However, in the hearing conducted by this Court on August 13, 2002, the Respondents indicated that they are now unwilling to produce any additional information.

counsel for Petitioners, and ordered the Respondents to allow counsel access to Hamdi. The Respondents then filed a motion for stay in the Court of Appeals for the Fourth Circuit pending appeal of the June 11, 2002, Order. On June 14, 2002, the Court of Appeals granted the Respondents' Motion for a stay of this Court's June 11 2002, Order and further ordered a stay of all proceedings before this Court in connection with Hamdi.

On June 26, 2002, the appellate court dismissed the petition brought by Frank Dunham finding an insufficient relationship between Mr. Dunham and the detainee. Hamdi v. Rumsfeld, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002). The appeals court further held that Hamdi's father had a sufficient relationship with Hamdi and had filed a valid next friend petition. See id. at 3 n.1.

On July 12, 2002, the Court of Appeals ruled on the Respondents' Appeal regarding this Court's June 11, 2002, access Order. Hamdi v. Rumsfeld, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002). In their appeal, the Respondents argued that the habeas petition should be dismissed in its entirety, or alternatively, the case should be reversed and remanded to this Court for further proceedings. The appeals court declined to dismiss the petition, finding that such dismissal would be premature. Id. at *5. Instead, the Court of Appeals reversed this Court's June 11, 2002, Order and remanded the case for further proceedings. Id. at 2. In reversing, the appellate court held that this Court failed to extend to the political branches the appropriate deference in matters of foreign policy and national security. Id. at *3. The appellate court then directed this Court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." Id. at *5-6.

On August 8, 2002, the Court of Appeals for the Fourth Circuit dissolved its stay order of June 14, 2002. In doing so, the Appeals Court stated "that the district court may proceed in strict compliance with our July 12, 2002 decision." August 8, 2002 Order at 1. The Court of Appeals

00000428

further directed this Court to "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." Id. at 2.

In response, this Court analyzed the Mobbs Declaration, considered briefs submitted from both the Respondents and the Federal Public Defender, and heard oral argument on August 13, 2002, from both sides. In strict compliance with the Court of Appeals August 8, 2002 Order, the sole purpose of the hearing was to determine whether the Mobbs Declaration, *standing alone*, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, and without access to counsel on U.S. soil.

Discussion

This case represents the delicate balance that must be struck between the Executive's authority in times of armed conflict and the procedural safeguards that our Constitution provides for American citizens detained in the United States. Due to the uncertainty regarding Hamdi's status whether he was an enemy combatant, was an unlawful enemy combatant, or just a bystander, the legal considerations are further complicated by the protections potentially afforded by the international law of war as expressed in the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949. 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), to which the United States is a signatory. Depending on Hamdi's status, the joint service regulations governing the detention of captured enemy combatants or others may also be implicated. See Joint Service Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997)(hereinafter Joint Service Regulation). These regulations "provide[] policy, procedures, and responsibility for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces." Id. at 1. The exact legal force of the these regulations is not now determined, but the

00000429

regulation states that it "implements international law, both customary and codified, relating to EPW, RP, CI, and ODs which includes those persons held during military operations other than war." Id. It specifically lists the GPW as one of the relevant treaties in its determination of international law. Id. At the very least, the Joint Service Regulation illustrates the U.S. military's position regarding its obligations under the GPW. Any decision regarding the legal effect of the GPW or the Joint Regulations would be premature at this point in the proceedings as it is necessary to first develop a factual background by which Hamdi's classification may be evaluated.[2] Under the facts that the Court has before it at this time, the Respondents have not shown that the requirements of the GPW nor the Joint Service Regulations, which apply regardless of the treaty, have been complied with. In light of the cautious procedures that the Court of Appeals outlined for this Court to follow, any determination of these issues would be premature as it is necessary to first develop a factual background.

The judiciary has traditionally shown "great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." Hamdi v. Rumsfeld, 2000 WL 1483908, at *3. The Supreme Court has made it clear that

2. The Joint Service Regulations as well as the treaty indicate that where a detainee's status may be in doubt that a military tribunal, appointed by the general courts-martial convening authority, must determine whether the detainee is a Prisoner of War. See Joint Service Regulation I-6(b)("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."); Joint Service Regulation Glossary ("Other Detainee - Persons in the custody of the U.S. Armed Forces who have not been classified as an EPW (article 4, GPW), RP (article 33, GPW), or CI (article 78, GC), shall be treated as EPWs until a legal status is ascertained by competent authority."); GPW Art. 5("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.")(the GPW does not allude to general courts-martial convening authority).

the President is afforded deference when exercising his authority as Commander in Chief. Ex parte Quinn, 317 U.S. 1, 28-29 (1942). Deference is proper because of the Executive's special competency, and constitutional responsibility, over the conduct of overseas military operations. Deference to the President is particularly appropriate when Congress has authorized the Executive to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). This deference extends to military designations of individuals as enemy combatants. Hamdi v. Rumsfeld, 2000 WL 1483908, at *4.

While it is clear that the Executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens. The scope of "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack." Id. at *5. The standard of judicial inquiry must also recognize that the "concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which sets this Nation apart. ... It would indeed by ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile." United States v. Robel, 389 U.S. 258, 264 (1967).

The Due Process Clause of the Fifth Amendment prohibits the government from "depriving" any person of liberty "without due process of law." U.S. Const. Amend. V. While Petitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge, Petitioners argue that the continuing indefinite imprisonment on U.S. soil, in solitary confinement, and without access to counsel violates the detainee's Fifth Amendment rights. Petitioners' Traverse and Response to Respondents' Motion to Dismiss ("Pet. Brief"), at 20. For its part, the Respondents argue that Hamdi's due process rights have not been violated because of the "historical unavailability of any right to prompt charges or counsel for those held as enemy combatants." Resp. Brief, at 10. When asked during the August 13, 2002, hearing what, if any, constitutional protections Hamdi was entitled to, counsel for the Respondents responded that the Constitution applied to the same extent as "it did to the individual who was alleged to be an American citizen in the Quirin case." August 13, 2002, Hr'g Tr. at 7. Upon further questioning by the court, the Respondents' counsel conceded that the individual in Ex parte Quirin that it referred to was afforded access to counsel and the opportunity to defend himself before a military tribunal. Id. It is apparent that the defendant in Quirin to whom the Respondents referred was provided with a significantly broader measure of due process than Hamdi has received thus far. This Court finds that Hamdi is entitled to due process of law as provided by the Fifth Amendment to the United States Constitution.

The question then becomes whether the Respondents' classification of Hamdi's combatant status has violated his due process rights under the Constitution. The Respondents contend that the Mobbs Declaration is sufficient, by itself, to allow this Court to conduct a meaningful judicial review to insure that the government has not violated any of Hamdi's rights and protections. While

recognizing the deference due to the Executive's decisions regarding combatant status classifications, the Court finds that a meaningful judicial review must, at a minimum, determine:

(1) Whether the government's classification of the detainee's status was determined pursuant to appropriate authority to make such determinations.

(2) Whether the screening criteria used to make and maintain the classification of an American born detainee held in the continental United States met sufficient procedural requirements as to be consistent with the Fifth Amendment's prohibition against governmental deprivation of life, liberty, or property without due process of law.

(3) On what basis has the government determined that the continuing detention of Hamdi without charges and without access to counsel serves national security.

(4) Whether the Geneva Treaty or the Joint Services Regulations required a different process.[3]

An examination of the Mobbs Declaration reveals that it falls far short of even these minimal criteria for judicial review. The Respondents produced the Mobbs Declaration as attachment 1 to its brief filed on July 25, 2002. The document is two pages long and consists of nine numbered paragraphs. The declaration is signed by a Michael H. Mobbs and dated July 24, 2002. A thorough examination of the Mobbs Declaration reveals that it leads to more questions than it answers.

The declaration fails to address the nature and authority of Mr. Mobbs to review and make declarations on behalf of the Executive regarding Hamdi's classification. Paragraph 1 of the Mobbs

3. Counsel for the Respondents indicate that the armed services did not have to follow the Joint Service Regulations when first taking Hamdi in custody. August 13, 2002, Hr'g Tr. 30, 31.

Declaration states that Mr. Mobbs is a Special Adviser to the Undersecretary of Defense for Policy. Mobbs Decl. at 1. The declaration does not indicate what authority a "Special Advisor" has regarding classificanon decisions of enemy combatants. Indeed, the declaration does not indicate whether Mr. Mobbs was appointed by the President, is an officer of the United States, is a member of the military, or even a paid employee of the government. During the August 13, 2002, hearing, when asked to explain Mr. Mobbs' authority and role in Hamdi's classification as an enemy combatant, the Respondents' counsel was unable to do so. Tr. at 10. In a general way, the declaration never refers to Hamdi as an "illegal" enemy combatant. The term is used constantly in Respondents' Memorandum. Nor is there anything in the declaration about intelligence or the gathering of intelligence from Hamdi. There is a huge amount of this in legal arguments. There is nothing to indicate why he is treated differently than all the other captured Taliban. There is no reason given for Hamdi to be in solitary confinement, incommunicado for over four months and being held for some eight-to-ten months without any charges of any kind. This is clearly an unreasonable length of time to be held in order to bring criminal charges.[4] So obviously criminal charges are not contemplated.

In Paragraph 2 of the Mobbs Declaration, Mr. Mobbs claims a familiarity with the policies and procedures applicable to Hamdi's detention. He claims to have reviewed the relevant records and reports regarding Hamdi's detention and capture. Mobbs Decl. at 1. The declaration does not answer under whose authority and by what procedures Mr. Mobbs engaged in such a review. Nor does it explain whether Mr. Mobbs is responsible for supervising the classification decisions of others. These are important considerations for any meaningful judicial review because the Court must be able

4 Confinement for 48 hours triggers the right to a preliminary hearing. Riverside v. McLaughlin, 500 U.S. 44 (1991).

00000434

to determine whether the person(s) making the classification decision did so with the authority of the Executive and pursuant to the statutes, rules, and regulations pertaining to such matters.

The declaration is insufficient to determine whether the screening criteria used by the government in classifying Hamdi and in making the decision to transfer Hamdi to the Norfolk Naval Brig violated his Fifth Amendment rights to the due process of law or violated the law or regulations of the Country. In paragraph 3 of the declaration, Mr. Mobbs states that Hamdi was "affiliated with a Taliban military unit and received weapons training." Id. The declaration makes no effort to explain what "affiliated" means nor under what criteria this "affiliation" justified Hamdi's classification as an enemy combatant. The declaration is silent as to what level of "affiliation" is necessary to warrant enemy combatant status. These are crucial determinations for purposes of judicial review. It does not say where or by whom he received weapons training or the nature and extent thereof.[5] Indeed, a close inspection of the declaration reveals that Mr. Mobbs never claims that Hamdi was fighting for the Taliban, nor that he was a member of the Taliban. Without access to the screening criteria actually used by the government in its classification decision, this Court is unable to determine whether the government has paid adequate consideration to due process rights to which Hamdi is entitled under his present detention.

In Paragraph 4 of the Mobbs Declaration, it indicates that Northern Alliance forces were engaged in battle with the Taliban. It does not say that the Taliban unit to which Hamdi was "affiliated" was ever in any battle while Hamdi's was "affiliated." Id. Nor does it identify the unit. Nor does it indicate who commanded the unit or the type of garb or uniform Hamdi may have worn when taken by the Northern Alliance. It further indicates after Hamdi "surrendered" that he kept his

5 Did someone give him a weapon and say "here's the safety and there's the trigger?"

00000435

weapon.[6] He only gave up the weapon prior to being placed in prison. All the while he was under the care, custody and control of Northern Alliance forces. Whether the forces he surrendered to was led by a "war lord" or the unidentified unit to which he was "affiliated" was led by a "war lord" or whether the war lords changed sides is not set forth.

In paragraph 5 of the declaration, the U.S. interrogation team interviewed Hamdi while he was under the "Northern Alliance" control. It says that Hamdi identified himself as a Saudi citizen who had been born in the United States.[7] Mr. Mobbs claims that during the interview, Hamdi admitted that he "entered Afghanistan the previous summer to train with and, *if necessary*, fight for the Taliban." Id. (emphasis added). The Court notes that the declaration does not quote from this alleged admission from Hamdi, but rather appears to be paraphrased. A possible inference from Hamdi's alleged statement was that he was not fighting for the Taliban when he was surrendered to the Northern Alliance forces. It does not indicate what the "if necessary" connotes. Does it mean in self defense or did a threatened force from the Taliban make it "necessary?"

Paragraph 6 of the Declaration states Hamdi was originally classified as an enemy combatant by "military forces" based upon his interviews and in light of his association with the Taliban. Id. at 2. The document is silent on whose military forces, i.e. U.S. military forces or Northern Alliance forces, who originally classified Hamdi as an enemy combatant. If it was Northern Alliance forces that originally classified him, then it is unclear how Northern Alliance forces differentiated themselves from Taliban forces during the conflict. Was there some garb of each that made

6 This doesn't sound like he was expected to fight or escape.

7 The regulation required such a team to determine the name, rank, date of birth, city and country of birth, name and address of next of kin, date of capture, place of capture, capturing unit, circumstances of capture, nation in whose armed services the individual is serving and much more information. Joint Services Regulation 1-7.

identification easy to participants? Is any individual associated with or near the Taliban an "enemy combatant?"

In paragraph 7, Mr. Mobbs states that Hamdi was determined to meet the "criteria" for enemy combatants by the U.S. military screening team at the Sheberghan prison. Id. There is no mention of the criteria used to make such a determination.

In paragraph 8, the declaration states that "a Detainee Review and Screening Team established by Commander, U.S. Central Command reviewed Hamdi's record and determined he met the criteria established by the Secretary of Defense for individuals over whom U.S. forces should take control and transfer to Guantanamo Bay." Id. It is unclear whether the Detainee Review and Screening Team's criteria at Kandahar was the same criteria used to make the determination regarding Hamdi's status as an enemy combatant at Sheberghan. It does not list the criteria used.

In paragraph 9, the declaration asserts that a "subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant." Id. at 2. Again, it appears that Mr. Mobbs is merely paraphrasing a statement supposedly made by Hamdi. Due to the ease with which such statements may be taken out of context, the Court is understandably suspicious of the Respondents' assertions regarding statements that Hamdi is alleged to have made. While it may be premature, and eventually unnecessary, for the Court to bring Hamdi before it to inquire about these statements, the Court finds that it must be provided with complete copies of any statements by Hamdi in order to appropriately conduct a judicial review of his classification. Petitioners' counsel asserted at the hearing that some of these statements were unclassified and provided by the government to counsel for John Phillip Walker Lindh in a companion case in this district.

Without access to the screening criteria and Hamdi's statements, it is impossible to evaluate whether Mr. Mobbs is correct in his assertion that Hamdi's classification as an enemy combatant is justified. The Mobbs Declaration is little more than the government's "say-so" regarding the validity of Hamdi's classification as an enemy combatant. If the Court were to accept the Mobbs Declaration as sufficient justification for detaining Hamdi in the present circumstances, then it would in effect be abdicating any semblance of the most minimal level of judicial review. In effect, this Court would be acting as little more than a rubber-stamp. While the Respondents may very well be correct that Hamdi is appropriately classified as an enemy combatant, the Court is unwilling on the sparse facts before it to find so at this time. Obviously, the Respondents have the information as the United States military generally follows their own regulations.[8]

We must protect the freedoms of even those who hate us, and that we may find objectionable. If we fail in this task, we become victims of the precedents we create. We have prided ourselves on being a nation of laws applying equally to all and not a nation of men who have few or no standards. The warlords of Afghanistan may have been in the business of pillage and plunder. We cannot descend to their standards without debasing ourselves. We must preserve the rights afforded to us by our Constitution and laws for without it we return to the chaos of a rule of men and not of laws. Our Constitution was the first to develop a government of checks and balances. The legislative, executive, and judicial branches each check each other. While the Executive may very well be correct that Hamdi is an enemy combatant whose rights have not been violated, the Court is unwilling, on the sparse facts before it to find so at this time on the basis of the Mobbs Declaration. Therefore it is necessary to obtain the additional facts requested.

8. Disobedience of regulations generally results in discipline actions.

00000438

The Clerk of the Court is **DIRECTED** to transmit this Order via facsimile and U.S. mail to all counsel of record and to mail a copy to Yaser Esam Hamdi.

IT IS SO ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

August 14, 2002

00000439

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI as next friend of YASER ESAM HAMDI, Petitioners,	)	
v.	)	CIVIL ACTION NO. 2:02cv439
DONALD H. RUMSFELD, Secretary of Defense, and COMMANDER W. R. PAULETTE, Norfolk Naval Brig, Norfolk, Virginia, Respondents.	)	

TRANSCRIPT OF TELEPHONIC CONFERENCE

Norfolk, Virginia

August 20, 2002

Before: THE HONORABLE ROBERT G. DOUMAR
United States District Judge

COPY

Appearances:

FEDERAL PUBLIC DEFENDER
By: LARRY M. SHELTON, ESQUIRE
Counsel for the Petitioners

DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
By: GREGORY GEORGE GARRE, ESQUIRE
and
UNITED STATES ATTORNEY'S OFFICE
By: LAWRENCE R. LEONARD, ESQUIRE
Counsel for the Respondents

THE COURT: Identify yourself when speaking, please.

MR. SHELTON: Sir, this is Larry Shelton, Public Defender's Office. Your Honor, I'm calling to request the Court's permission to have until 10 o'clock tomorrow morning to respond to the respondents' motion for certification of interlocutory appeal and for stay.

THE COURT: All right. You oppose it?

MR. LEONARD: Judge, this is Larry Leonard. No, we don't oppose it, Your Honor, and we would like to ask the Court's consideration to delaying the production order for 24 hours to permit time for you to consider the motion.

THE COURT: Well, I don't mind delaying the production order until Monday under the circumstances.

MR. SHELTON: We have no objections, Your Honor, to a reasonable delay.

MR. LEONARD: Thank you, Your Honor.

THE COURT: All right. So we'll do that. But let's discuss the question of the certification, Mr. Leonard.

MR. LEONARD: Yes, sir.

THE COURT: What we'll do is I want it in at 12:00 noon. I'll grant you an extension until 12:00 noon Monday, to be delivered to the judge's chambers 12:00 noon Monday, okay?

MR. LEONARD: The judge's chambers, yes, sir.

THE COURT: And that's -- what is Monday's date?

THE CLERK: The 26th.

MR. LEONARD: The 26th.

THE COURT: August 26th, 2002.

MR. LEONARD: Yes, sir.

THE COURT: 12:00 noon, judge's chambers, under seal.

MR. LEONARD: Yes, sir.

THE COURT: All right. No copies are to be delivered to opposing counsel.

MR. LEONARD: Understood.

THE COURT: All right. Now, something perplexes me, Mr. Leonard. In the order I indicated that material that affected national security could be redacted. Did anybody read that?

MR. LEONARD: Yes, Your Honor.

THE COURT: Well, why are you saying it involves national security when --

MR. GARRE: Your Honor, this is Mr. Garre.

I think our point was that material requested, you know, even allowing for redaction, would account for virtually all the material the Court has requested, so that we appreciate Your Honor's efforts to take into account the national security sensitive nature of the information, but, even taking that into account, the way Your Honor -- it has raised serious issues about what even could be provided to the Court.

THE COURT: Well, tell me, what is the issue? I'm confused now. What is the issue, Mr. Garre? I have a lot of

problems with the issue because what I was trying to do is proceed as cautiously as possible. Now, you're saying that it affects national security. How?

MR. GARRE: Well, I mean, certainly -- and, you know, again this would be something we could get into, you know, in terms of an effort to comply to get to that point but certainly would involve, you know, substantially classified material, as well as material -- and this is something we're evaluating -- that would be --

THE COURT: Did I misunderstand?

MR. GARRE: -- privileged.

THE COURT: My understanding was that evidently Mr. West was not telling Mr. Dunham the truth when he said the material that was given to him was not classified. Have you recently classified it?

MR. GARRE: Your Honor, with respect, I think the materials that Mr. Dunham was referring to are different and wouldn't be subject to materials I'm referring to. We're not talking about the same things. We're referring to statements or notes from intelligence gathering interviews and other materials, names and addresses of those engaged in interviews, including military personnel, primarily on the field in Afghanistan. I think we're referring to different things. Of course, a lot of it would refer to, you know, other stuff that the Court's order referred to, materials that were relevant,

legally relevant, to a determination of Hamdi's status. And, of course, that issue, we think, is tied up with some of the issues that were discussed at the hearing, and that were addressed in the motion for dismissal, and that we think, you know, would be addressed --

THE COURT: Mr. Garre, you can cut it short. What you're saying is you-all feel that certain material, even though it's unclassified, and even though other people have seen it, cannot be seen by the undersigned or this judge; is that correct?

MR. GARRE: No, Your Honor, it's not.

THE COURT: Well, why wouldn't you disclose the information that you've disclosed to Mr. West, who was attorney for Mr. Lindh?

MR. GARRE: I think -- and, again, I don't want to go through material that was the subject of the hearing, but I think a lot of this goes to what is legally relevant to a determination of Mr. Hamdi's status. And --

THE COURT: You know, Mr. --

MR. GARRE: Material that is the subject of the Court's production order if classified -- we haven't maintained that every single piece is classified, but whether or not a single piece of material covered by the order would be classified, we think there is a threshold question of what material the Court would need to see to make an enemy -- to

review the military's enemy combatant determination in this situation, and we think that those issues are addressed by the Court's recent order and would be appropriate for certification to the Court of Appeals so that we can -- we understand Your Honor has made his ruling, but we think that guidance from the Court of Appeals on the appropriate standard here would be of assistance in going forward and determining what types of material would be legally relevant.

Again, I don't want to go on at undue length here, but I think Your Honor's order, initial order, would be materials relevant to Hamdi's legal status.

THE COURT: All right. Let me ask you a couple of questions, Mr. Garre, and this is this: Do you contend, therefore, that the Army regulations do not apply to people in the United States Army?

MR. GARRE: No, Your Honor.

THE COURT: All right. So the Army regulations would apply to any Army person, and the Navy regulations would apply to any Navy person; is that correct?

MR. GARRE: I haven't sat down to reread the regulations this morning, but certainly in the broad sense, yes, Your Honor. I mean, the regulations also have limitations on when and where they do apply, and I don't want to go back through material that was subject to the hearing, but we don't think they would apply in this case.

THE COURT: So the Army regulations do not apply in a case of capturing someone on an enemy -- who's on a battlefield or near a battlefield of someone who is opposing an ally of ours; is that correct? I assume the Northern Alliance is an ally of ours.

MR. GARRE: The Coalition forces we've been fighting with, yes, Your Honor. Again, the main point I wanted to stress at the hearing is that the regulations do define POWs covered by certain provision, and in our view that definition does not encompass Mr. Hamdi.

Again, to make another point that we --

THE COURT: Well, somebody in the Army had to decide it, didn't they?

MR. GARRE: Sure. And that, again, is something we think is covered by --

THE COURT: What the problem is is because they refer to the convening authority being required to establish a military tribunal, and convening authority means a general court-martial convening authority?

MR. GARRE: Once they made a determination as to the legal status, there is no need for that tribunal.

THE COURT: Who was the person who made the decision?

MR. GARRE: Well --

THE COURT: I mean, we're not entitled to know that, or was it Secretary -- the respondent himself who made the

decision? Is he the person?

MR. GARRE: That Mr. Hamdi was an enemy combatant and should be detained is a decision that the Taliban and the al-Qaida are unlawful enemy combatants.

THE COURT: Would you explain to me what unlawful means?

MR. GARRE: Well --

THE COURT: Has he committed a crime? That's what unlawful is generally, correct?

MR. GARRE: Your Honor, I think the way it has been referred under the laws and customs of war, and I think the Quirin case again discusses that, is that unlawful refers to those who don't meet the criteria of --

THE COURT: They didn't say unlawful. They just said he was a belligerent; is that correct? They didn't say he was an unlawful, did they?

MR. GARRE: It goes to those who meet the criteria of the POW status in the Geneva Convention and under the laws and customs of war. Here the President has made the determination that the al-Qaida and the Taliban don't meet those criteria because, for example, they don't wear uniforms when they fight and they don't follow the laws of war because they attack civilians.

THE COURT: Well, I have some problems, starting with McLaughlin. Are you familiar with the McLaughlin case that

says any person who is being held for a criminal offense, that would be an unlawful offense, must have a preliminary hearing within 48 hours?

MR. GARRE: Your Honor, we've made clear Mr. Hamdi is not being held on any criminal charges, and we also made clear --

THE COURT: They didn't say he had charges. They said he had to have a preliminary hearing. You see, unlawful assumes he's done something against the law; is that correct?

MR. GARRE: Under the laws of war, Your Honor --

THE COURT: The laws of war?

MR. GARRE: The laws of war permit the capture and detention --

THE COURT: Who defines the laws of war? Does the Geneva Convention define the laws of war?

MR. GARRE: It may comprise a part of that, but I think it's a much broader --

THE COURT: Because obviously --

MR. GARRE: The Quirin case is the case the Court can look to to describe the particular laws and customs of war that would be applicable here. Again, I want to make the distinction between the determination that al-Qaida and Taliban detainees are unlawful combatants and the determination that was made with respect to Mr. Hamdi, that he should be detained as an enemy combatant. That determination is laid out in the

Mobbs' Declaration. And we appreciate that Your Honor has --

THE COURT: You know, the Medley case indicated that solitary confinement under the terms as set forth in the Colorado statute, which is exactly the same as these terms and conditions; that is, he can be visited by a chaplain or a minister -- only it was a little broader. He could have a minister of his choice. But he could be seen by the custodian, but that's -- they held that was punishment because it -- in order to hold it was an ex post facto law they had to hold it was punishment. And that was in Medley. And then we come along with Gideon that says you're entitled to counsel. And then Miranda.

Obviously at some point they must have suspected him of something. You know, the whole thing is standing on its ear. But, however, Mr. Garre, it does appear that an appropriate solution would be to go ahead and appeal the case.

What do you think, Mr. Shelton? Because then you can go all the way to the Supreme Court. And once it's certified and it's appealed, maybe you can finally get a hearing from either the Court of Appeals or the Supreme Court of the United States.

MR. SHELTON: Your Honor, we want to respond to their motion. We believe there are some things that the Court might want to consider prior to reaching that conclusion, so we certainly would like an opportunity to respond. The Court

could make its decision thereafter. And we intend to have that response filed by 10 o'clock tomorrow morning.

THE COURT: Can you have it filed by 10 o'clock tomorrow morning?

All right. You file it by 10 o'clock tomorrow morning. But here is the problem. I want to make a ruling by tomorrow afternoon. It appears, Mr. Shelton, that certainly the Fourth Circuit has a tremendous interest in this case. It is obvious to me that the respondents do not want to give the information. It also is apparent to me that the respondents are preparing to have what one would say is a standoff between the executive and judicial branches, and that it might be better to have the Court of Appeals go ahead and rule so that we can get out of the way any problems of having a clash between the judiciary and the executive. I am not interested in creating a clash.

MR. SHELTON: Your Honor, we aren't either.

THE COURT: But it's becoming obvious, Mr. Shelton, that whomever is running the case, whether it be the Justice Department or the Defense Department, whichever department is running the case -- and I couldn't tell you who's running the case -- they have made a decision to say we are just not going to do it, we want to hold this man for as long as we want in solitary confinement, which seems to me to be the very antithesis of everything the Constitution stands for.

MR. SHELTON: Your Honor, our position simply is if the government wants to stand on the Mobbs' Declaration -- the Court has found that declaration to be inadequate -- bring Mr. Hamdi before the Court. Get the answers from Mr. Hamdi.

THE COURT: Well, that may be a solution, but in the long run wouldn't it be better to have everything solved?

MR. SHELTON: The Fourth Circuit could not have the benefit of Hamdi's version of facts. We're still going to come back at some point to that determination. So if the government is not prepared to give me that information, we need to bring Mr. Hamdi before the Court.

THE COURT: What do you think about that, Mr. Garre?

MR. GARRE: Well, several things. First, obviously we would oppose that for, you know, many of the same reasons we would oppose sending a lawyer to Mr. Hamdi. And we've already addressed those at length. Secondly, I think that the posture the case is in now has clearly been the focus on the Mobbs' Declaration, which --

THE COURT: No. You have focused it on the Mobbs' Declaration, and the Court of Appeals has sort of agreed with you on that, so perhaps it better go back to the Court of Appeals so they can make a determination with regard to the Mobbs' Declaration.

MR. GARRE: Your Honor, that's certainly the approach that we've --

THE COURT: You must have known that there were a lot of loose ends in the Mobbs' Declaration to start with. I haven't found out who Mobbs is yet. I don't know if he was just hired to make this declaration or not.

MR. GARRE: Your Honor, with respect, I think we addressed that at the hearing. That is covered by the declaration. We understand Your Honor has had questions about that, and --

THE COURT: I don't know who he is. My God, all you've got to do is say he's a special advisor? The whole thing is pretty loose, and, yet, there is no question in my mind that Mr. Hamdi has brought about some of his own problems since he did have a weapon it appears. Couldn't figure out who he was going to shoot with it because he kept it even after he supposedly surrendered. It strikes me as a little odd. It doesn't -- it may not strike you as odd. I'd never heard of anything in any wars that I heard of before. Maybe -- it just struck me as odd.

In any event, the whole thing strikes me as odd; however, I'm seriously thinking about going ahead and certifying it. But Mr. Shelton raises an interesting point, perhaps the solution is to release you from that requirement and just produce Hamdi according to the statute for writs of habeas corpus.

MR. GARRE: Your Honor, we would be happy to respond

to what Mr. Shelton filed, but obviously --

THE COURT: Well, you better respond right now because I'm going to make up my mind tomorrow. This thing has gone on and on, and I want to make up my mind. If we certify it, we are causing Mr. Hamdi to be in confinement for a couple of more months in solitary. Perhaps something could be worked out where he wouldn't be placed in solitary and I wouldn't feel so -- the way I feel. I feel solitary is a means of psychological punishment, if not real punishment. I tend to agree with the Medley case, which is a Supreme Court case, which says it is punishment.

The Fourth Circuit has held you could be there as long as six months as long as you had escape paraphernalia. I don't think anyone has suggested that he has escape paraphernalia, but I'm not sure what his sentence was. Was his sentence one year, two years, 10 years, life? We haven't found that out yet. The sentence is forever?

MR. GARRE: Let me respond to the points. First, we absolutely oppose the notion Mr. Hamdi should be brought into the courtroom. That would mean the most drastic approach.

THE COURT: It would mean no confrontation between the executive and the judiciary.

MR. GARRE: Obviously we would absolutely oppose that, and we would oppose it for the same reasons we opposed providing Mr. Shelton access to Hamdi. And, you know, we've

explained those reasons to the Court. I believe the Court --

THE COURT: The Fourth Circuit has ruled with you up to this point.

MR. GARRE: The letter --

THE COURT: You know something? It does not seem to me to be appropriate subsequent to a decision on the Mobbs' Declaration.

MR. GARRE: I would agree, Your Honor. I think it makes the most sense to certify the issue in the Mobbs' Declaration. As Your Honor noted, that's the issue the Court of Appeals mentioned in its most recent -- issuing the mandate that was the subject of the hearing.

THE COURT: How can I submit a declaration from an individual whom I don't know has any connection with the United States of America? For all I know, he's a Saudi Arabian advisor.

MR. GARRE: Your Honor, I think that the declaration refutes that, that he's been substantially involved in the operation.

THE COURT: He says he is a person who's very familiar with this operation. I would assume the most familiar person would be someone who has knowledge of the area and the people in the area. And that would be somebody like perhaps somebody who has served over there in one capacity or another. I don't know. He may be with the Brookings Institute for all I

know.

MR. GARRE: Your Honor, that's not the case. It's obvious he's a special advisor to the Under Secretary of Defense.

THE COURT: Who is the Under Secretary of Defense? At least he's appointed by the President with the consent of the Senate; is he not?

MR. GARRE: Your Honor, no. The Under Secretary for Policy is. He works for that individual.

THE COURT: I'm not talking about Mobbs. I'm talking about the Under Secretary. Doesn't he have to have Senate consent?

MR. GARRE: Yes, Your Honor. Let me reassure you if the Fourth Circuit determines the legality of Mr. Hamdi's detention turns on whether or not Mr. Mobbs is an employee of the United States, there will be absolutely no issue about that.

THE COURT: What do you mean there is no issue? You mean you're going to present some evidence in the Fourth Circuit? I didn't know they took evidence up there. But I guess you could present anything you like. Maybe they'll give you a hearing.

MR. GARRE: But if --

THE COURT: And you can present Hamdi up there. You can, you know. They can issue a writ of habeas corpus out of

the Fourth Circuit. The Fourth Circuit has a right to do that in a habeas. I think that's one. You can apply to any court in the United States for a habeas. You can apply to any judge in the United States for a habeas for that matter.

So I understand your point, Mr. Garre. It just has me -- it gives me some problems because if we start with Medley and we go to Gideon and then to Miranda and then to McLaughlin --

MR. GARRE: I hope Your Honor would read Quirin as well.

THE COURT: I read Quirin. Quirin was people who landed on the shores of the United States ready to blow up portions of this country. And I'm very familiar with Quirin. And I know what they said. And this fellow is not even -- we don't even know he was going to do anything other than he was receiving some training, according to Mobbs, whom we don't know knows anything. We do know that the circumstances of his capture, or whatever you call it, his taking, would have been written down, according to the Army regulations, giving the date of his capture, the circumstances of his capture, all of these materials that are absolutely required by Army regulations.

And I would presume, and assume, that any person, any officer of the United States, would follow the Army regulations; therefore, you have the information. And if Mobbs

had any grain of sense he would have known the date of capture because somebody would have taken it down. He would have known the circumstances of capture because somebody was required by the regulation to take it down. He would have known a lot of information which he has deliberately omitted from the declaration.

If you deliberately omit material, one has to assume that the material would be adverse to the party presenting it.

MR. GARRE: Your Honor, I would disagree with both the notion he's deliberately omitted things and that you could draw skepticism from that fact. The Mobbs' Declaration contains what we think are the grounds and circumstances resulting in his capture and detention, and it reviews the military's determination he is an enemy combatant.

THE COURT: I don't think -- if you tried to present that before me in a case --

MR. GARRE: Mr. Mobbs --

THE COURT: -- for summary judgment, I would throw you out on your ear; however, since it's the Secretary of Defense that's presenting it, I think it carries some weight because I am not interested in throwing the Secretary of Defense in jail; however, it may be better to certify it, get all of the answers, and then we will determine what happens.

MR. GARRE: Your Honor, in that vein, I mean, we would --

THE COURT: Maybe the Supreme Court of the United States will follow your position. I have serious doubts that you'd ever be able to obtain such a ruling from the Supreme Court of the United States or, indeed, I don't think you're going to get such a favorable ruling from any Court of Appeals of the United States; however, I may still certify it, primarily to avoid a confrontation which has now become obvious.

But, Mr. Shelton, get me that memorandum in here by 10 o'clock tomorrow morning.

MR. SHELTON: Yes, sir.

THE COURT: I will extend the time. I'll get out an order, a short order, saying pursuant to the motion made today that -- I will get out a short order saying that the time is extended until noon, August 26th, to produce the material and then determine -- to give you an opportunity to file a memorandum. And then I will determine whether the matter should be certified.

Now, I'm not quite sure what matter is being certified. What matter do you want to certify exactly?

MR. GARRE: Your Honor, we laid it out in our motion. It would be the issues covered by Your Honor's August 16th order, which would include --

THE COURT: You want to say that the law issue is the sufficiency of the facts contained in the Mobbs' Declaration?

MR. GARRE: That's right, Your Honor, and the validity of the scope and materials requested under the production order. We think that's the two issues.

THE COURT: Either you get one or the other. I'm not allowing any appeal from the production order because I haven't even entertained that. I'm going to issue a stay of that if I certify it. Now, what you want certified is the Mobbs' Declaration. The production order gets to be ridiculous because you're yelling it's national security, and it isn't even involved under any circumstances.

MR. GARRE: Well --

THE COURT: Look, Mr. Garre, it gets ridiculous. And it's insulting to me. And I'm sorry to say that a judge would have the gall to -- what you're indicating is I would turn this over to some terrorist group. And that is insulting, believe me.

MR. GARRE: Your Honor --

THE COURT: Most insulting. And you tell the Secretary that I said so. And I'm instructing you to say so to him. And that's enough of that. However, I am seriously thinking about certifying the question of the Mobbs' Declaration. Don't get me into the other situation when you're yelling national security. I don't know who drew that paper or who put that in there, but don't impugn my loyalty to this country.

MR. LEONARD: Your Honor, this is Larry Leonard.

I can assure you that there was no intention on the respondents' part to do that at all. The question of the information did not have to do with any uncertainty on the part of the government that there would ever be such a writ, Your Honor. The focus of the issue is whether or not the Mobbs' Declaration stands alone and therefore it would require the production of additional information of this nature, certainly not that Your Honor might do something untoward with it or in any event question the integrity in the very least, Your Honor.

MR. GARRE: Your Honor, this is Mr. Garre.

I would echo Mr. Leonard's statements.

THE COURT: Well, you see, what bothered me, very frankly, is the fact that I said file it under seal in camera. I don't know how more secure I could make it other than that.

MR. LEONARD: Your Honor, I mean, we've fully noted -- we fully intend to provide to the Court the classified document regarding the screening --

THE COURT: Don't provide me with anything. I made my decision on the Mobbs' Declaration. I've made my decision. Just provide what I asked for, but don't provide me anything after I've made my ruling.

MR. LEONARD: Very well.

THE COURT: Just don't. I don't want something to clutter up the record. I asked for it. You're not giving me

anything else. You want to give me something that you think might be advantageous so you can present it to the Court of Appeals and then say, hey, look, this judge made a mistake? Look, I still probably will certify it unless Mr. Leonard can persuade me not to.

My inclination is I am not interested in getting into a situation where we clash with the executive department. And I'm certainly not interested in trying to hold the Secretary in contempt.

You'll file the material, Mr. Shelton, by 10 o'clock tomorrow morning.

Mr. Garre, the order is extended until the 26th at noon. I'll get out a short order on that based on the hearing today.

Is there anything else you want to take up?

MR. SHELTON: No, Your Honor. Nothing from the petitioners' standpoint.

MR. GARRE: Nothing from the respondents, Your Honor. Thank you very much for your time.

THE COURT: Good-bye.

(The proceedings were concluded.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Penny Commander Wile

Penny Commander Wile, RMR, CRR

August 29, 2002

Date

FILED
AUG 21 2002
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser Esam Hamdi,

Petitioners,

v. CIVIL ACTION NO. 2:02cv439

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

CERTIFICATION ORDER AND STAY

This Court certifies the following question to the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b).

Certified Question: Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

Certification of this question is appropriate because it involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this Court's August 16, 2002, Order may materially advance the ultimate termination of this litigation.

The Court STAYS the deadline for compliance with its August 16, 2002, production Order until five (5) days after the Court of Appeals for the Fourth Circuit either declines jurisdiction over the appeal or issues a ruling on the certified question.

Procedural History

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham filed a habeas corpus petition, naming as petitioners both Yaser Esam Hamdi and himself

as Hamdi's next friend. After holding a hearing on May 29, 2002, this Court concluded that the habeas corpus petition was properly filed and ordered that Hamdi be allowed to meet with the Federal Public Defender on June 1, 2002. On May 31, 2002, the Respondents filed a motion in the Court of Appeals for the Fourth Circuit for a stay pending appeal of this Court's access order on the grounds that there was an insufficient relationship between Hamdi and the Federal Public Defender. The Court of Appeals granted the Respondents' Motion.

While the Federal Public Defender's petition was submitted to the appeals court, Esam Fouad Hamdi, the detainee's father, filed a separate petition for a writ of habeas corpus naming as petitioners both Yaser Esam Hamdi and himself as next friend. On June 11, 2002, this Court found that Hamdi's father had properly filed his habeas petition as next friend, appointed the Federal Public Defender as counsel for Petitioners, and ordered the Respondents to allow counsel access to Hamdi. The Respondents then filed a motion for stay in the Court of Appeals for the Fourth Circuit pending appeal of the June 11, 2002, Order. On June 14, 2002, the Court of Appeals granted the Respondents' Motion for a stay of this Court's June 11, 2002, Order and further ordered a stay of all proceedings before this Court in connection with Hamdi.

On June 26, 2002, the appellate court dismissed the petition brought by Frank Dunham finding an insufficient relationship between Mr. Dunham and the detainee. Hamdi v. Rumsfeld, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002). The appeals court further held that Hamdi's father had a sufficient relationship with Hamdi and had filed a valid next friend petition. See id. at 3 n.1.

On July 12, 2002, the Court of Appeals ruled on the Respondents' Appeal regarding this Court's June 11, 2002, access Order. Hamdi v. Rumsfeld, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002). In their appeal, the Respondents argued that the habeas petition should be dismissed

in its entirety, or alternatively, the case should be reversed and remanded to this Court for further proceedings. The appeals court declined to dismiss the petition, finding that such dismissal would be premature. Id. at *5. Instead, the Court of Appeals reversed this Court's June 11, 2002, Order and remanded the case for further proceedings. Id. at 2. In reversing, the appellate court held that this Court failed to extend to the political branches the appropriate deference in matters of foreign policy and national security. Id. at *3. The appellate court then directed this Court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." Id. at *5-6.

On August 8, 2002, the Court of Appeals for the Fourth Circuit dissolved its stay order of June 14, 2002. In doing so, the appeals court stated "that the district court may proceed in strict compliance with our July 12, 2002 decision." August 8, 2002, Order at 1. The Court of Appeals further directed this Court to "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." Id. at 2.

In response, this Court analyzed the Mobbs Declaration, considered briefs submitted from both the Respondents and the Federal Public Defender, and heard oral argument on August 13, 2002, from both sides. In strict compliance with the Court of Appeals August 8, 2002, Order, the sole purpose of the hearing was to determine whether the Mobbs Declaration, *standing alone*, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, and without access to counsel on U.S. soil.

On August 16, 2002, this Court held the Mobbs Declaration insufficient as a matter of law to justify Hamdi's classification as an enemy combatant. Instead of ordering the government to allow the Federal Public Defender access to Hamdi and in the interest of the least intrusive measures

00000466

possible, the Court ordered the government to produce the documents previously requested in its July 31, 2002, Order.[1] The Court required the production of the documents by August 21, 2002. To allay any concerns regarding national security implications of the requested documents, the Court ordered the sealed documents be produced ex parte and solely for in camera review.

On August 19, 2002, the Respondents filed a Motion for Certification of Interlocutory Appeal and for Stay. On August 20, 2002, the Court held a telephonic conference with lawyers for both sides to discuss the effect of the motion on the Court's production Order.[2] The Respondents requested an extension of time for compliance with this Court's August 16, 2002, production Order while the Court considered their latest motion. After considering the matter, the Court ordered Petitioners to file any response to Respondents' Motion by August 21, 2002, and granted the Respondents an extension of time on the production order until August 26, 2002.

Discussion

The Respondents' Motion for Certification of Interlocutory Appeal and for Stay requests that this Court certify the question of whether the Mobbs Declaration, *standing alone*, is sufficient to allow this Court to conduct a meaningful judicial review of Hamdi's classification status. Resp't Mot. for Certification of Interlocutory Appeal and for Stay, at 1 [hereinafter Resp't Mot.]. Under 28 U.S.C. § 1292(b), the Court has the discretion to certify such an appeal from an interlocutory order. Certification is proper if the following criteria are met: (1) the order involves a controlling question

1 The 16 August, 2002, Order also required the Respondents to produce the screening criteria used to make the determination of Hamdi's status as an enemy combatant. The Respondents indicated in its Motion for Certification that it was now willing to turn the criteria over. Resp't Mot. for Certification of Interlocutory Appeal and for Stay, at 2 n.1.

2 All telephonic conferences are with a clerk and a court reporter.

00000467

of law; (2) there is substantial ground for difference of opinion regarding the question; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

I. The August 16, 2002, Order Involves a Controlling Question of Law

The Respondents' assert that the Court's production Order involves a controlling question of law. As support for this proposition, the respondents' cite the recent Court of Appeals for the Fourth Circuit's statement that "[i]t has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." Resp't Mot., at 2-3 (quoting Hamdi v. Rumsfeld, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002)). It is unclear what the Court of Appeals meant by this statement and this Court has several reservations regarding the implications of such a finding. First, the Executive's unilateral determination of Hamdi's status appears to violate the protections afforded by the international law of war as expressed in the Geneva Convention Relative to the Treatment of Prisoners of War, to which the United States is a signatory. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"). The GPW requires that any doubt regarding a person's status be determined "by a competent tribunal." Id. at Article 5. There is no evidence from the facts before the Court, limited as they are, that Hamdi's status was determined by a competent tribunal. The Court notes that the GPW never mentions the term "enemy combatant." ABA Task Force on Treatment of Enemy Combatants, Preliminary Report, August 8, 2002, at 7-8 ("Until now, as used by the attorney general, the term "enemy combatant" appeared nowhere in U.S. criminal law, international law or in the law of war.")(internal citations omitted).

The second reservation that the Court has regarding the lawfulness of the Executive's unilateral determination of Hamdi's status is that it appears to violate the joint service regulations governing the detention of captured enemy combatants or others. See Joint Service Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997)(hereinafter Joint Service Regulation). The Joint Service Regulation indicate that where a detainee's status is in doubt, a military tribunal, appointed by the general courts-martial convening authority, must determine whether the detainee is a prisoner of war. Joint Service Regulation 1-6(b)("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."). Here again, there is no evidence before the Court that Hamdi's status was determined by a military tribunal in accordance with the Joint Service Regulation.

In addition to the reservations listed above, the Court points out that any finding that the Executive can unilaterally classify a person born in the United States as an enemy combatant, justify the classification on naked assertions such as those contained in the Mobbs Declaration, and thereby claim the authority to hold the detainee indefinitely, incommunicado, and in solitary confinement may have grave consequences for numerous Supreme Court precedents and their progeny. See Riverside v. McLaughlin, 500 U.S. 44, 56 (1991)(holding that a judicial determination of probable cause is required within 48 hours of person being taken into custody); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); In re Medley, 134 U.S. 160, 168-71 (1890)(holding that solitary confinement is a form of punishment).

00000469

Despite this Court's reservations regarding the lawfulness of the Executive's unilateral determinanon of Hamdi's status and his resulting indefinite detention, this Court declined to decide these issues in consideration of the Court of Appeals direction that this Court "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." August 8, 2002, Order at 2. As painstakingly set forth in this Court's August 16, 2002, Order, the Court found the Mobbs Declaration insufficient to allow the Court to conduct a meaningful judicial review of Hamdi's classification as an enemy combatant. Among the many shortcomings of the Mobbs Declaration highlighted by the Court, the Court found that the declaration failed to: (1) explain who Mr. Mobbs is and establish his authority to make or review Hamdi's classification as an enemy combatant; (2) establish that the government's classification of Hamdi's status was determined pursuant to appropriate authority to make such determinations; (3) establish that the screening criteria used to make and maintain Hamdi's classification met sufficient procedural requirements as to be consistent with the Fifth Amendment's prohibition against governmental deprivation of life, liberty, or property without due process of law; and (4) explain the governmental determination that Hamdi's continuing detention without charges and without access to counsel serves national security. In light of these omissions, as well as the others set forth in the August 16, 2002, Order, this Court was forced to find the Mobbs Declaration insufficient as a matter of law.

While the Court feels that the Mobbs Declaration is clearly insufficient, *standing alone*, to justify Hamdi's classification, it recognizes that such a decision necessarily implicates the broader question of the degree of deference due to the Executive's determination. In earlier opinions, the Court of Appeals made it clear that the Executive is entitled to a great level of deference. But, the Appeals Court also declined to dismiss the petition, stating "[i]n dismissing ... with no meaningful

judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." Hamdi, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002)(emphasis added). In its August 16, 2002, Order, this Court set forth the criteria it believes represent the balance between the appropriate level of deference to the Executive and the meaningful judicial review required under the circumstances. In applying these criteria to the Mobbs Declaration, the Court found the Declaration insufficient. However, given the Court of Appeals statement that if Hamdi is found to be an enemy combatant, then his detention is lawful, it appears that this Court's determination regarding the sufficiency of the Mobbs Declaration is a controlling question of law. If the Court held the Mobbs Declaration sufficient to classify Hamdi as an enemy combatant, then the Court of Appeals has indicated that judicial review of his status is at an end.

II. Substantial Ground Exists for Difference of Opinion

Due to the implications regarding the criteria set forth by the Court to conducts its judicial review of Hamdi's classification, the Court acknowledges that substantial ground exists for a difference of opinion regarding the sufficiency of the Mobbs Declaration. The Court believes that judicial deference to the Executive's authority cannot justify approving of Hamdi's classification as an enemy combatant based solely on the say-so of a "Special Adviser" to the Under Secretary of Defense for Policy. However, given the great deference that the Executive is entitled to in time of hostilities, the Court realizes that reasonable minds may differ in this opinion. This realization is enforced by the Court of Appeals for the Fourth Circuit's emphasis that "[o]ur Constitution's commitment of the conduct of war to the political branches of American government requires the Court's respect at every step." Hamdi, 2002 WL 1483908, at *3 (4th Cir. July 12, 2002).

III. An Immediate Appeal May Materially Advance the Ultimate Termination of the Litigation

If the Court of Appeals determines that this Court's finding regarding the sufficiency of the Mobbs Declaration is erroneous, then such a determination may advance the ultimate termination of the litigation. As previously noted, if the Mobbs Declaration is sufficient proof of Hamdi's status as an enemy combatant, then the Court of Appeals has indicated that further judicial review of his current detention is foreclosed. Despite any reservations this Court may have about this proposition, this Court is bound to follow the dictates of the Court of Appeals for the Fourth Circuit. To fail to do so would stand over 200 years of American jurisprudence on its ear.

If the appellate court affirms this Court's holding that the Mobbs Declaration is insufficient, then this may also materially advance the ultimate termination of the litigation. It has become obvious that the Respondents appear to be prepared to defy this Court's production Order, and, thereby, create a confrontation between the executive and judicial branches of our government. While this Court would like to avoid any such confrontation, it will not abdicate its Constitutional responsibilities to do so. If the Court of Appeals affirms this Court's August 16, 2002, production Order, then this Court hopes that it will give the Respondents pause before embarking on a confrontation that would be harmful to both the Executive and the Judiciary.

The Clerk of the Court is **DIRECTED** to transmit this Order via facsimile and U.S. mail to all counsel of record and to mail a copy to Yaser Esam Hamdi.

IT IS SO ORDERED.

/s/

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

August 21, 2002